No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT ON REARGUMENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Summary of argument	3
Argument:	
I. Section 22 of the Internal Security Act of 1950 does not require a finding that the alien was aware of the Communist Party's advocacy of the forcible overthrow of the Government	7
II. Congress has the power to provide, as in Section 22 of the Internal Security Act of 1950, for the deportation of aliens who at any time after entry have been members of the Communist Party	24
A. Decisions of Congress to deport classes of aliens are political determinations which this Court has held are not reviewable by the judiciary	25
B. The determination by Congress in Section 22 to make deportable aliens who at any time after entry have been members of the Communist Party is amply supported by the legislative findings and by administrative and judicial decisions	40
1. The *Harisiades* and *Carlson* rulings and their background	41
2. The particular history of Section 22 of the 1950 Act	55
3. Judicial and administrative adjudications as to the Communist Party	63
4. Congressional power, under the due-process clause, to deport specifically named classes of aliens	67
C. The deportation of past Communists does not violate the *ex post facto* or bill of attainder provisions of the Constitution	73
1. *Ex post facto* clause	73
2. Bill of attainder clause	74
D. The deportation of past Communists such as petitioner does not violate the First Amendment	77
Conclusion	77

CITATIONS

ases: Page

Adler v. *Board of Education*, 342 U. S. 485 65
Albert Appeal, 372 Pa. 13 66
American Communications Ass'n v. *Douds*, 339 U. S. 382 ..... 64, 68, 71–72
Antolish v. *Paul*, 283 Fed. 957 ..... 17, 64
Bilokumsky v. *Tod*, 263 U. S. 149 ..... 35, 67
Block v. *Hirsh*, 256 U. S. 135 63
Branch v. *Cahill*, 88 F. 2d 545 21
Bridges, Ex parte, 49 F. Supp. 292 ..... 17, 20
Bridges v. *Wixon*, 326 U. S. 135 ..... 16, 17, 20, 21, 24
Bugajewitz v. *Adams*, 228 U. S. 585 ..... 31, 74, 75
Carlson v. *Landon*, 342 U. S. 524 ..... 4, 5, 31, 33, 41, 51, 54, 55, 64, 68, 74
Chinese Exclusion Case, The, 130 U. S. 581 ..... 27, 28, 29, 31, 35, 37, 38
Cummings v. *Missouri*, 4 Wall. 277 74
Dennis v. *United States*, 341 U. S. 494 ..... 57, 58, 77
Fok Yung Yo v. *United States*, 185 U. S. 296 31
Fong Yue Ting v. *United States*, 149 U. S. 698 ..... 4, 27, 29, 30, 32, 33, 34, 35, 37, 68, 74, 75, 76
Fortmueller v. *Commissioner*, 14 F. Supp. 484 ..... 17, 20, 21
Galvan v. *Press*, 347 U. S. 522 ..... 1, 2, 7, 22, 25, 32, 50, 74
Garland, Ex parte, 4 Wall. 333 74
Greco v. *Haff*, 63 F. 2d 863 ..... 17, 20
Harisiades v. *Shaughnessy*, 187 F. 2d 137, affirmed, 342 U. S. 580 ..... 1, 2, 3, 4, 5, 6, 7, 20, 24, 25, 26, 27, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 50, 51, 52, 53, 54, 55, 58, 64, 66, 67, 69–70, 73, 74, 76, 77
Hawker v. *New York*, 170 U. S. 189 77
Japanese Immigrant Case, 189 U. S. 86 ..... 31, 32
Jay v. *Boyd*, 351 U. S. 345 2
Jurgans, Ex parte, 17 F. 2d 507 ..... 17, 64
Kessler v. *Strecker*, 307 U. S. 22 ..... 5, 44
Kjar v. *Doak*, 61 F. 2d 566 ..... 17, 19, 64
Kwong Hai Chew v. *Colding*, 344 U. S. 590 ..... 31, 32, 35
Lapina v. *Williams*, 232 U. S. 78 31
Latva v. *Nicolls*, 106 F. Supp. 658 37
Lehmann v. *Carson*, 353 U. S. 685 ..... 2, 7, 31, 74, 75
Lem Moon Sing v. *United States*, 158 U. S. 538 31
Li Sing v. *United States*, 180 U. S. 486 ..... 31, 34, 37

	Page
Low Wah Suey v. *Backus*, 225 U. S. 460	31
Ludecke v. *Watkins*, 335 U. S. 160	4, 36, 70
Mahler v. *Eby*, 264 U. S. 32	27, 31, 74, 75
Marcello v. *Bonds*, 349 U. S. 302	2, 7, 74
Matter of D, 3 I. & N. Dec. 787	16
Matter of H [*Harisiades*], 3 I. & N. Dec. 411	16
Matter of O, 3 I. & N. Dec. 736	16
McKay v. *Boyd*, 218 F. 2d 666, certiorari denied, 350 U. S. 840	2
Milasinovich v. *The Serbian Progressive Club*, 369 Pa. 26	66
Mulcahey v. *Catalanotte*, 353 U. S. 692	2, 7, 32, 74, 75
Murdoch v. *Clark*, 53 F. 2d 155	17, 64
Ng Fung Ho v. *White*, 259 U. S. 276	31
Osman v. *Douds*, 339 U. S. 846	68
Pierce v. *Carskadon*, 16 Wall. 234	74
Rabang v. *Boyd*, 353 U. S. 427	32
Saderquist, In re, 11 F. Supp. 525, affirmed, 83 F. 2d 890	17, 18, 19, 64
Schneiderman v. *United States*, 320 U. S. 118	65
Schware v. *Board of Bar Examiners*, 353 U. S. 232	38
Shaughnessy v. *Mezei*, 345 U. S. 206	25, 31, 37, 38
Skeffington v. *Katzeff*, 277 Fed. 129	17, 18, 64
Tiaco v. *Forbes*, 228 U. S. 549, affirming 16 Phil 534	4, 28, 31, 35
Tisi v. *Tod*, 264 U. S. 131	36, 67
Turner v. *Williams*, 194 U. S. 279	4, 31, 35, 39, 69
Ungar v. *Seaman*, 4 F. 2d 80	17, 20, 64
United Public Workers v. *Mitchell*, 330 U. S. 75	38
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	28, 31
United States v. *Dennis*, 183 F. 2d 201, affirmed 341 U. S. 494	64
United States v. *Ju Toy*, 198 U. S. 253	31
United States v. *Lovett*, 328 U. S. 303	7, 74, 75, 76
United States v. *Spector*, 343 U. S. 169	73, 75
United States v. *Wallis*, 268 Fed. 413	17, 20, 21
United States ex rel. Kettunen v. *Reimer*, 79 F. 2d 315	22
United States ex rel. Klonis v. *Davis*, 13 F. 2d 639	37
United States ex rel. Lisafeld v. *Smith*, 2 F. 2d 90	22
United States ex rel. Volpe v. *Smith*, 289 U. S. 422	31
United States ex rel. Yokinen v. *Commissioner of Immigration*, 57 F. 2d 707	17, 64
Vajtauer v. *Commissioner*, 273 U. S. 103	67

Page

Vilarino, Ex parte, 50 F. 2d 582 ..... 17, 18, 19, 64
Wiman v. *Uplegraff*, 344 U. S. 183 38
Wong Yang Sung v. *McGrath*, 339 U. S. 33 ..... 31, 32
Wong Wing v. *United States*, 163 U. S. 228 ..... 31, 68, 73, 74, 75
Yates v. *United States*, 354 U. S. 298 65
Yick Wo v. *Hopkins*, 118 U. S. 356 ..... 30, 32
Zakonaite v. *Wolf*, 226 U. S. 272 31

Constitution and Statutes:
Constitution of the United States:
Article I, Section 9, Clause 3 74
First Amendment 7, 42, 77
Fifth Amendment 42
Fourteenth Amendment 30
Statutes:
Act of March 3, 1903, 32 Stat. 1213 9
Act of February 20, 1907, 34 Stat. 898 9
Act of June 28, 1940 (54 Stat. 670, 8 U. S. C. 137) 24
Alien Enemy Act of 1798, 1 Stat. 570 ..... 6, 36, 69, 70, 71, 72
Alien Registration Act of 1940, 54 Stat. 670, 8 U. S. C. (1946 ed.) 137 ..... 13, 15, 23, 64
Sec. 2 (a) 15
20 15
23 (a) 32, 42, 57
23 (c) 5
Anarchist Deportation Act of October 16, 1918, 40 Stat. 1012 ..... 9, 12, 13, 15, 23, 46
Anarchist Deportation Act of June 5, 1920, 41 Stat. 1008 ..... 9, 23
Immigration Act of February 5, 1917, 39 Stat. 874 9
Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101, *et seq.*:
Sec. 241 39
241 (a) 63
241 (a) (3) 69
241 (a) (8) 69
241 (a) (11) 2
Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781, *et seq* 22, 23, 64, 65
Sec. 2 ..... 62, 72

	Page
Sec. 22	2, 4, 5, 6, 7, 8, 24, 41, 42, 50, 51, 52, 55, 58, 62, 63, 66, 69, 71, 72, 73, 74, 76, 77
Public Law 14 (Act of March 28, 1951), 65 Stat. 28, 82d Cong., 1st Sess.	3, 22, 23
Subversive Activities Control Act, 64 Stat. 1007, Subsection (2) (E)	8
Voorhis Act of October 17, 1940, 54 Stat. 1201, 18 U. S. C. 2386	57, 58
Miscellaneous:	
Annals of Congress, 5th Cong., 2d Sess., pp. 1786, 1792	70
Clark, *Deportation of Aliens from the United States to Europe* (1931):	
pp. 60–69	39
pp. 222–223	18
56 Cong. Rec. 8122	47
59 Cong. Rec.:	
p. 999	11
p. 1003	12
p. 8539	12
p. 8665	12
84 Cong. Rec.:	
p. 9537	45
p. 10359	49
p. 10365	46
p. 10367	45–46
pp. 10448–9	14, 47–48
p. 10449	44
p. 10456	15
p. 11124	13
86 Cong. Rec.:	
p. 473	13
p. 7649	14
p. 8345	41
96 Cong. Rec.:	
pp. 12058, 12060	59
p. 14180	8
p. 15287	63
97 Cong. Rec. 1370–1372, 1374, 1375, 2369, 2370, 2372–2373	23

Page

Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Cong., 1st Sess. (1939) vol. 7, pp. 4432, 4671 57
Hearings before Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., on H. R. 5138 ..... 44, 45, 48–49
H. Rep. 645, 65th Cong., 2d Sess 9
H. Rep. 504, 66th Cong., 2d Sess 9, 10
H. Rep. 2290, 71st Cong., 3d Sess 55, 56, 64
H. Rep. 153, 74th Cong., 1st Sess.:
p. 12 56
p. 21 56
H. Rep. 994, 76th Cong., 1st Sess 13
H. Rep. 2582, 76th Cong., 3d Sess 58
H. Rep. 2683, 76th Cong., 3d Sess 15
H. Rep. 3112, 81st Cong., 2d Sess.:
p. 34 8
p. 48 63
H. Rep. 148, 82d Cong., 1st Sess 23
Immigration and Naturalization Systems of the United States, the, S. Rep. 1515, 81st Cong., 2d Sess., pp. 788–789 69
Landis, *Deportation and Expulsion of Aliens*, 5 Encyc. of Soc. Sci. (1930), p. 97 18
IV Moore, *Digest of International Law*, p. 67, *et seq* 28
Reorganization Plan V, 5 F. R. 2223, 2132 10
S. 1832, 81st Cong., 2d Sess 58
S. 4037, 81st Cong., 2d Sess 59
S. Rep. 1154, 76th Cong., 1st Sess 13
S. Rep. 1721, 76th Cong., 3d Sess 13
S. Rep. 1796, 76th Cong., 3d Sess 14
S. Rep. 2230, 81st Cong., 2d Sess.:
pp. 10, 11, 12, 16 59–60
pp. 16–17 69
pp. 24–25 61–62
p. 26 40
S. Rep 2369, Part 2, 81st Cong., 2d sess., p. 14 63
S. Rep. 111, 82d Cong., 1st Sess 23
Van Vleck, *The Administrative Control of Aliens* (1932):
pp. 3–22, 33 ff 39
pp. 3–22, 83, *et seq* 39
pp. 38–39, 88–89, 129–131 18

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 5

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT ON REARGUMENT

In our brief on the original argument, we submitted (Point II, pp. 38–43) that there was no reason to reconsider the constitutional holdings of *Galvan* v. *Press*, 347 U. S. 522 and *Harisiades* v. *Shaughnessy*, 342 U. S. 580. We pointed out that during the past five years the issue has twice been fully presented to the Court, in detail, and has twice been decided in comprehensive opinions. Petitioner brings forward no argument which has not been made heretofore. No changed conditions are, or can be, alleged; nor is the Court being asked to review decisions rendered in a period or milieu said to be outmoded, or based on

constitutional principles which are no longer accepted or have been limited since the challenged decisions were rendered. Since *Galvan,* the Court has recognized its constitutional principles as settled. *Jay* v. *Boyd,* 351 U. S. 345, 348 (recognizing the power in Congress under Section 22 to deport an alien who was a voluntary member of the Communist Party during the period 1935–1940); see also *Marcello* v. *Bonds,* 349 U. S. 302, 314 (rejecting the contention that deportation for crimes committed prior to passage of Section 241 (a) (11) of the Immigration and Nationality Act of 1952 is violative of the *ex post facto* clause); *Lehmann* v. *Carson,* 353 U. S. 685, 690; and *Mulcahey* v. *Catalanotte,* 353 U. S. 692, 694 (reiterating the rule that Congress may legislate retrospectively in deportation matters); and cf. *MacKay* v. *Boyd,* 218 F. 2d 666 (C. A. 9), certiorari denied, 350 U. S. 840.

For these same reasons, we are still of the view that sound judicial practice should impel the Court to accept the holdings of *Galvan* and *Harisiades* without reconsidering them. However, the issue of constitutionality has been raised and pressed by petitioner, and, since the case is to be reargued, it seems appropriate, for the convenience of the Court, to collect in a single brief in this case the pertinent portions of the discussions on that question in the various Government's briefs in *Galvan* and *Harisiades*—to which we fully adhere. It is also appropriate, in view of certain contentions made by petitioner, to repeat *in extenso* our argument in *Galvan* on the statutory point that Section 22 of the Internal Security Act of 1950 does *not* require a finding that the alien was aware of

the Communist Party's advocacy of the forcible overthrow of the Government.[1] In each instance, we collate, without more, the discussions in the earlier briefs, believing them to be complete and adequate for the purpose.

SUMMARY OF ARGUMENT

I

Just as was the case with the 1940 statute enforced in *Harisiades,* the 1950 Act does not require knowledge by the alien of the Communist Party's advocacy of the forcible overthrow of the Government.

A. On its face, the 1950 Act makes a clear distinction between membership in the Communist Party and membership in "front" organizations, requiring awareness of the organization's aims only in the latter case. The immediate legislative history of the 1950 statute emphasizes this plain distinction.

B. Moreover, the history, since 1918, of this class of deportation legislation plainly shows that personal advocacy or knowledge is not a prerequisite. The debates in Congress show this to be true; the consistent administrative practice by the Immigration Service is in accord; and the uniform judicial holdings since the 1920's are to the same effect.

C. No change in this respect was made by Public Law 14, the Act of March 28, 1951, 65 Stat. 28. That Act, which Congress regarded as a clarifying amendment which would not change the law, establishes that membership in an unlawful organization must

---

[1] This material is referred to, but not spelled out, in footnote 12, p. 31, of our original brief in the present case.

be "voluntary," not resulting from duress or compulsion, but it did not add any requirement of knowledge of the organization's unlawful objectives.

II

Section 22 of the 1950 Act, prescribing the deportation of past members of the Communist Party, is valid.

A. As the Court has repeatedly held since 1893, Congressional decisions to deport classes of aliens are political determinations not normally reviewable by the judiciary. The basis for this principle is that the power to expel is intimately connected with foreign affairs—since aliens remain subject to the control of a foreign state and their presence can thus lead to international controversies and embarassment; as well as become a source of external danger. For this reason, the legislative power is held to be "plenary" (*Carlson* v. *Landon,* 342 U. S. 524, 534); the courts cannot intervene unless, perhaps, the action of Congress is a "fantasy or a pretense" or has "no possible grounds" to support it (*Harisiades* v. *Shaughnessy,* 342 U. S. 580, 590). The authority and the responsibility belong to Congress, and this Court and the lower courts have consistently upheld and enforced expulsion laws which have seemed to many to be harsh, discriminatory, or unfair, because judges have no concern with the "wisdom", "policy", "justice", or "severity" of those measures. *E. g., Fong Yue Ting* v. *United States,* 149 U. S. 698; *Turner* v. *Williams,* 194 U. S. 279; *Tiaco* v. *Forbes,* 228 U. S. 549; *Ludecke* v. *Watkins,* 335 U. S. 160; *Harisiades* v. *Shaughnessy,* 342 U. S. 580. As against a legislative decree terminating their license to remain here, aliens (who have a divided allegiance and are not full members of the community) cannot

call upon constitutional protections as broad as those available to citizens. Conversely, because the nation's policy toward aliens touches so directly upon the conduct of foreign affairs, the political branches have full sway.

B. The validity of Section 22 is directly supported, not only by these traditional principles, but also by the decisions in *Harisiades*, 342 U. S. 580, and *Carlson*, 342 U. S. 524, 535–6. The latter held Section 22 valid as applied to present Communists, and the former sustained the prior deportation statute [2] as applied in 1952 to aliens who were members of the Communist Party before 1940, even though there was no showing that the aliens themselves advocated or knew that the Party advocated violent overthrow of the Government.

The two decisions, read together, cover petitioner's case which does not differ in its facts from instances before the Court in *Harisiades* and its companion cases. The Court recognized that the sponsors of the 1940 amendment wished to make sure that the law required deportation of former members of a subversive organization so as to make it impossible for alien members to avoid deportation merely by resigning from the party. Cf. *Kessler v. Strecker*, 307 U. S. 22.

The only difference, as applied here, between Section 22 of the 1950 Act and the 1940 Act upheld in *Harisiades* is the specification in the 1950 statute of membership in the Communist Party as a basis for deportation, thus removing the necessity of proving

[2] Section 23 (c) of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, subjecting to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the Government by force and violence.

again and again in deportation cases the nature and objectives of the Party. Congress based this determination upon overwhelming evidence, received by its committees between 1931 and 1950, that the Communist Party has as its purpose the violent overthrow of the Government of the United States and serves as a fifth column for the Soviet Union, largely through the aid of alien Communists. These conclusions are buttressed by repeated judicial decisions since 1920 as to the nature and purposes of the Communist Party, by some 200 administrative determinations in deportation cases since that time, as well as by the record of persistent espionage, sabotage, and propaganda by Communists here and elsewhere on behalf of the Soviet Union. In view of the purposes of the Party as found by Congress, Section 22 is a reasonable exercise of the legislative power to provide for the deportation of any class of aliens whose presence in this country may endanger the security of the United States. The ending of the alien's theoretical right to a hearing on the nature of the Communist Party is not a significant difference from *Harisiades*.

The power of Congress to name the Communist Party specifically is also supported by the history of the country's expulsion legislation which contains some famous precedents for group designation without regard to individual worthiness. The Chinese deportation laws are the prime illustration. The Alien Enemy Act of 1798, on which Congress drew by way of analogy, is another, as is the anarchist deportation statute.

C. The reaffirmation in *Harisiades* that deportation is not a punishment for the purposes of the

ex post facto clause of the Constitution disposes of petitioner's contention that Section 22 is a bill of attainder (as well as an *ex post facto* law), since a bill of attainder is a legislative act which inflicts *punishment* without trial. (*United States* v. *Lovett*, 328 U. S. 303, 315). See *Marcello* v. *Bonds*, 349 U. S. 302, 314; *Lehmann* v. *Carson*, 353 U. S. 685, 690; *Mulcahey* v. *Catalanotte*, 353 U. S. 692, 694.

D. The First Amendment is not violated by petitioner's deportation since he was a member of the Communist Party and *Harisiades* expressly holds (342 U. S. at 592) that deportation for past membership in that Party does not abridge First Amendment rights.

ARGUMENT

I

SECTION 22 OF THE INTERNAL SECURITY ACT OF 1950 DOES NOT REQUIRE A FINDING THAT THE ALIEN WAS AWARE OF THE COMMUNIST PARTY'S ADVOCACY OF THE FORCIBLE OVERTHROW OF THE GOVERNMENT

As pointed out in our original brief in this case (pp. 30–31), Galvan specifically argued that the Internal Security Act of 1950 exempted "innocent" past members of the Communist Party from deportation, and the Court expressly rejected that contention (*Galvan* v. *Press*, 347 U. S. at 525–6). This holding was unquestionably correct.

A. In the first place, as the Court observed, the 1950 Act makes a specific distinction between aliens who are or were members of the Communist Party and members of Communist-front organizations required to register under the Subversive Activities

Control Act; aliens belonging to such organizations are not to be deported if they "establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization * * * that such organization was a Communist organization." Subsection (2) (E), 64 Stat. 1007. With respect to this provision, the sponsor of the 1950 Act, Senator McCarran, said: "[A]liens who were innocent dupes when they joined a Communist-front organization, as distinguished from a Communist political organization [such as the Communist Party], would likewise not ipso facto be excluded or deported." 96 Cong. Rec. 14180.[3] Thus, not only was the problem and its solution revealed on the face of the bill but they were also directly called to the attention of the Congress by the sponsor.

B. Moreover, the 1950 Act sought to "strengthen" the provisions of the former law relating "to the exclusion and deportation from the United States of subversive aliens" (H. Rep. 3112, 81st Cong., 2d Sess., p. 34), and it is plain that, even under the pre-1950 law, knowledge by the alien of the purposes of the subversive organization was not essential to deportability.

---

[3] It is also significant that paragraphs (A), (B), (D), (F) and (G) of Section 1 (2) under Section 22 relate in whole or part to an alien's personal beliefs; and paragraphs (B), (C), (D), (F) and (H) relate in whole or part to membership in objectionable organizations, without any mention of the alien's knowledge or support of the objectives of such organizations. Moreover, Congress had no difficulty in specifying that certain misconduct had to be committed "knowingly", as it did in Paragraph (G), which deals with the circulation of inflammatory literature.

1. The legislative development of the Anarchist Deportation Act furnishes strong initial support for this conclusion as to the basic legislative design. The original immigration enactment directed against subversive aliens was the Act of March 3, 1903, 32 Stat. 1213, which dealt primarily with anarchists and prohibited their entry into the United States only on the basis of a personal belief in anarchy. These provisions were continued in the Act of February 20, 1907, 34 Stat. 898, and were recodified and somewhat expanded in the basic Immigration Act of February 5, 1917, 39 Stat. 874. Until then the statutes dealt only with personal beliefs.

These enactments were in effect superseded by the Anarchist Deportation Act of October 16, 1918, 40 Stat. 1012, enacted in the closing days of World War I in order to cope with what was believed to be the menace of the I. W. W. and other extremist factions. This legislation is the foundation upon which the later enactments in this area rest. In this statute, Congress provided for the first time for the deportation of aliens who were members of prohibited organizations. H. Rep. 645, 65th Cong., 2d Sess.

In the administration of the 1918 Act, the Department of Labor concluded that deportation charges could not be supported merely by proof of membership in the I. W. W., but that the evidence had to establish in addition personal advocacy of the proscribed doctrines on the part of the alien. See H. Rep. 504, 66th Cong., 2nd Sess. Congress thereupon amended the Anarchist Deportation Act on June 5, 1920, 41 Stat. 1008, for the express purpose of insur-

ing that membership in an organization which advocated or distributed literature advocating the forceful overthrow of the Government of the United States would in itself be a basis for deportation. The report of the House Committee on Immigration and Naturalization, which recommended adoption of this legislation, described in detail the alleged misinterpretation of the Department of Labor, pointed out that the Department of Justice had not agreed with that interpretation, and expressed its dissatisfaction with the Department of Labor's rulings. H. Rep. 504, 66th Cong., 2nd Sess. The Committee further stated, *id.* p. 7:

> In view of the foregoing the committee believes that Congress should amend section 1 of the act of October 16, 1918, and make it so plain and clear as to admit of no possible doubt that the spirit of the law must be held to coincide with the letter thereof.
>
> Eminent lawyers contend that the act of October 16, 1918, is sufficient, and that *the joining of an organization such as the Industrial Workers of the World is of itself the overt act sufficient to warrant deportation.* But as the decision of the Secretary of Labor is final in matters of deportation,[4] and as the decisions of that department above quoted have resulted in failure to deport aliens actively at work for the destruction of this Government, the necessity for the amendment becomes not only apparent but urgent. [Emphasis added.]

---

[4] On June 14, 1940, responsibility for administration of the immigration laws was transferred to the Attorney General. Reorganization Plan V, 5 F.R. 2223, 2132.

The principal changes achieved by the 1920 amendment were: (1) the designation of personal advocacy of proscribed doctrines, and membership in an organization advocating such doctrines, as separate causes for deportation; and (2) the addition of detailed directions for the deportation of aliens who distribute, or who are members of organizations which distribute, subversive literature. During the debate in the House of Representatives the following colloquy occurred, clearly portraying the legislative purpose (59 Cong. Rec. 999):

> *Mr. Hardy of Texas.* I understand; if you can prove enough against him he can be deported; but what I want to know is, has the Secretary of Labor, under the law, a right to deport a man simply upon proof that he is a member of the I.W.W.?
>
> * * * * * *
>
> *Mr. Raker.* If a man is a member of the organization teaching the doctrines that they do teach, that everyone knows and admits that they teach, that he holds a membership card which is found upon him, that he admits that he belongs to the organization and pays dues to the organization, the Government should deport him without a further overt act on his part.
>
> *Mr. Hardy of Texas.* The gentleman from California thinks that every man who holds a card in the I.W.W. ought to be deported?
>
> *Mr. Raker.* You can deport none but aliens. My statement is clear, and there is no doubt as to what it is. A man who belongs to an organization which advocates the unlawful de-

> struction of property, who believes in anarchy which teaches the overthrow and destruction of the Government of the United States by force and violence, which teaches the assassination of public officers because they are public officers, should be deported. There can be no question that it is the intent of Congress, the intent of the American people, and the desire of ninety-nine persons out of a hundred of the men, women, and children who believe in this country, that this law ought to be enforced and enforced rigidly.

Not even Representative Hardy dissented when the bill subsequently was approved unanimously and without change in the House of Representatives. 59 Cong. Rec. 1003. The Senate Immigration Committee amended the bill by inserting "knowingly" in relation to circulating subversive literature, to make it conform with the prohibition against knowingly possessing such literature which was already in the bill. 59 Cong. Rec. 8539. Significantly, no similar change in relation to *membership* in a proscribed organization was suggested or adopted at any stage in the proceedings. The bill, as amended by the Senate Committee, was passed without comment or objection in the Senate (*ibid.*), and the House thereafter concurred in the Senate amendments. *Id.*, p. 8665.

We believe that this history of the 1920 amendment demonstrates that Congress intended, in the Anarchist Deportation Act and in its amendments, to deport alien members of the prohibited groups, without regard to whether their membership was maintained with knowledge of the denounced objectives.

2. The next major revision of the Anarchist Deportation Act occurred in the Alien Registration Act of June 28, 1940, 54 Stat. 670. Here, too, the legislative proceedings are instructive. In the original draft of this bill, the House Committee on the Judiciary urged that expulsion should be ordered if the alien, at any time after entry, "knowingly and voluntarily at any time became a member" of any of the designated classes. H. Rep. 994, 76th Cong., 1st Sess. p. 6. This phraseology appeared in Section 2 of the proposed bill, which was approved in this form by the House of Representatives. 84 Cong. Rec. 10,456.

The Senate Judiciary Committee in its initial report favored approval of the House bill without amendment, and thus proposed to continue the specification that the membership must have been "knowingly and voluntarily"[5] undertaken. S. Rep. 1154, 76th Cong., 1st Sess.; 84 Cong. Rec. 11,124. However, this report was withdrawn and the bill was recommitted to the Committee. 86 Cong. Rec. 473. The Senate Committee thereafter issued a second report, S. Rep. 1721, 76th Cong. 3d Sess., but the exact form of the revision appears neither in that report nor in any statements on the floor of the Senate. However, the committee report stated (p. 2):

> The amendment of the Senate committee striking out section 2, and inserting the language of existing law, was thought necessary to prevent hardship on aliens who may have, in the distant past, but who had renounced,

[5] The distinction between knowledge and voluntariness implicit in this proposal should be noted.

before coming to the United States, their membership in such classes.

The report mentioned no requirement that the membership *in the United States* must have been knowing and voluntary. This report likewise was withdrawn (86 Cong. Rec. 7649) and a new and final report was issued by the Senate Committee, which set forth the bill as finally approved by the Senate. In this final revision, the declaration that the membership must have been "knowingly and voluntarily" assumed was omitted. S. Rep. 1796, 76th Cong., 3d Sess. There is no explanation as to the reason for that omission either in this report or at any other point in the legislative deliberations.[6] However, this final report declared (p. 3):

> Section 23 amends the act of October 16, 1918, which provides for the exclusion and deportation from the United States of aliens

---

[6] While the bill was under consideration in the House, and at a time when it still contained the limitation that membership must have been acquired "knowingly and voluntarily," Representative Hobbs pointed out, 84 Cong. Rec. 10,448 9, that:

> * * * in order to correct any possible hardships that might arise under the provisions of this section, on his motion, the words "knowingly and voluntarily" were inserted, so that the case of the poor Swede who joined the Communist Party without full knowledge of what he was doing, or the case of someone who might be under the influence of liquor or a narcotic and joined ignorantly, would be removed from the field of operation of this section * * *
>
> *Mr. Gwynne.* But it does not cover the case of a man who joined voluntarily.
>
> *Mr. Hobbs.* I realize that, and that of course is the crux of this situation * * *

> who are members of the anarchistic and similar classes, so as to provide that no alien shall be admitted to the United States who has at any time been a member of such classes, and to also provide that any alien who has been a member of such classes at any time after his admission to the United States (for no matter how short a time or how far in the past so long as it was after the date of entry), shall be deported.

This statement of purpose was repeated in the Conference Report, H. Rep. 2683, 76th Cong., 3d Sess. p. 9.

The Alien Registration Act of 1940, 54 Stat. 670, as finally passed by Congress, thus eliminated the direction, which had been incorporated in earlier versions of the measure, that deportation could be ordered only if the membership in the revolutionary society had been knowing and voluntary. This omission should be compared with other directives in Section 20 of the same statute, 54 Stat. 672, commanding the deportation of aliens who "knowingly" aided other aliens to enter in violation of law, and in Section 2 (a) of that statute, 54 Stat. 671, which prescribed criminal penalties for aliens who "knowingly" advocate the overthrow of the Government of the United States by force and violence. The omission of similar language in the 1940 amendment of the Anarchist Deportation Act shows that Congress did not regard knowledge as an essential element in expulsion orders directed against alien members of subversive groups.

3. Administrative rulings have taken the same position. For at least thirty-five years, the Immigration Service has held proof of membership and (prior to 1950) of the nature of the organization to be sufficient, and has not deemed it necessary in its deportation proceedings to introduce evidence of the alien's personal beliefs or knowledge or to make findings thereon where the charge is one of membership.[7] This practice and policy is revealed and confirmed by the available decisions of the Board of Immigration Appeals. See *Matter of H* [*Harisiades*], 3 I. & N. Dec. 411, 455, 458; *Matter of D*, 3 I. & N. Dec. 787, 788–9; *Matter of O*, 3 I. & N. Dec. 736, 744; *Matter of Coleman* (Transcript of Record, No. 264, Oct. Term, 1951, pp. 20–24); *Matter of Mascitti* (Transcript of Record, No. 206, Oct. Term, 1951, pp. 14, 17).[8] And it is especially significant that, in the *Bridges* deportation case, neither Presiding Inspector Sears nor the Attorney General found that Bridges knew or was aware of the unlawful objective of the Communist Party, nor did either of them discuss the matter of Bridges' knowledge in connection with the finding of Party membership or of Party affiliation; the same is true of the

[7] Of course, where the charge is one of personal advocacy, evidence of the alien's beliefs has been introduced, and even in membership cases such evidence has sometimes been brought out, by the alien or the Service, where it is readily available.

[8] In some of its decisions in which counsel have raised the issue of knowledge (*e. g.*, *Matter of O*, and *Mascitti's* case, *supra*), the Board of Immigration Appeals has said—in addition to holding flatly that it is unnecessary to prove knowledge—that membership in itself is sufficient evidence of knowledge of the proscribed doctrines, and also that the evidence showed that the alien attended Party meetings, read its literature, listened to speeches, and paid his dues.

decision of the Board of Immigration Appeals adverse to deportation. See Transcript of Record, No. 788, Oct. Term, 1944, pp. 73–106, 134–341, 367–492.[9]

The judicial decisions in Communist deportation cases also show that the administrative practice has been that findings as to the alien's awareness of the Party's doctrines are unnecessary, and it is sufficient to prove membership in the conventional sense. See, *e. g.*, *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1); *Antolish* v. *Paul*, 283 Fed. 957 (C. A. 7); *Ungar* v. *Seaman*, 4 F. 2d 80, 81 (C. A. 8); *Ex parte Jurgans*, 17 F. 2d 507, 511 (D. Minn.); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9); *Murdoch* v. *Clark*, 53 F. 2d 155 (C. A. 1); *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. A. 2); *Kjar* v. *Doak*, 61 F. 2d 566 (C. A. 7); *Greco* v. *Haff*, 63 F. 2d 863, 864 (C. A. 9); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1); *Fortmueller* v. *Commissioner*, 14 F. Supp. 484 (S. D. N. Y.); *United States* v. *Wallis*, 268 Fed. 413 (S. D.

---

[9] Bridges excepted to Judge Sears' failure to find that "the evidence does not establish that the alien had knowledge that the Communist Party of the U. S. A. at any time was an organization, association, society, or group" with the proscribed objectives (Transcript of Record, No. 788, Oct. Term, 1944, pp. 351–2). The same point was raised in the District Court (*see Ex parte Bridges*, 49 F. Supp. 292, 301 (N. D. Cal.), but was apparently not pressed in the Court of Appeals or in this Court. In *Bridges* v. *Wixon*, 326 U. S. 135, 149, the Court quoted an excerpt from the decision of Dean Landis, in the prior deportation proceeding, which indicated that Bridges expressed disbelief that the methods the Party wished to employ "were as revolutionary as they generally seem" and was unequivocal in his "distrust of tactics other than those that are generally included within the concept of democratic methods."

N. Y.). The same understanding of the administrative practice seems indicated by informed writers on the subject. See Landis, *Deportation and Expulsion of Aliens,* 5 Encyc. of Soc. Sci. (1930), p. 97 ("possession of the [radical] belief is unnecessary, mere ignorant membership in a radical party being sufficient"); Clark, *Deportation of Aliens from the United States to Europe* (1931), pp. 222-223; Van Vleck, *The Administrative Control of Aliens* (1932), pp. 38–39, 88–89, 129–131.

4. Judicial decisions are also in accord. Over the course of many years, the courts have invariably sustained deportation charges supported only by proof of membership in the Communist Party, coupled (prior to 1950) with an elaboration of that organization's violent objectives, without any requirement that the alien must be shown to know of and subscribe to those objectives. *E. g., Skeffington* v. *Katzeff,* 277 Fed. 129 (C. A. 1); *Ex parte Vilarino,* 50 F. 2d 582 (C. A. 9); *In re Saderquist,* 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1). Moreover, when the issue was raised, the courts have declared unequivocally that the alien's knowledge of or belief in the unlawful program of the Communist Party was not relevant to the consideration of such expulsion charges.

In none of these pre-1950 deportation cases does there appear to have been any administrative *finding* of knowledge of the Communist Party's aims or that the alien himself advocated forcible overthrow, and, also, in each case the court upheld the deportation order, without relying on evidence of the alien's

knowledge or belief, on the basis of a finding of membership in which "membership" meant precisely what it means in the administrative findings here. In *Ex parte Vilarino,* 50 F. 2d 582, 586 (C. A. 9), the Court of Appeals expressly sustained the deportation, in an alternative holding, "quite apart" from the meager "evidence" of personal knowledge. In *In re Saderquist,* 11 F. Supp. 525, 526–7 (D. Me.), affirmed on opinion below, 83 F. 2d 890 (C. A. 1), the judge specifically disregarded the charge that the alien personally advocated force and confined himself to the two charges involving membership in unlawful organizations; the opinion is limited to determining whether the Labor Department was "justified in finding that the organization in which the petitioner claims membership is one advocating the overthrow of our government by force" and quotes from *Kjar* v. *Doak,* 61 F. 2d 566, 569 (C. A. 7): "Nor was it necessary to prove that appellant had knowledge of the contents of the programs of the several organizations, or any one of them. It is sufficient if the evidence showed that he was a member of, or affiliated with, such an organization as contemplated by the statute." Similarly, *Kjar* v. *Doak, supra,* concerned itself solely with the issue of whether the Communist Party fell within the statutory class. The court first held—over the alien's objection that the Party advocated force only if the owners of capital refused to be peaceably dispossessed of their property once the Party has peaceably gained control of the government—that the evidence showed that the Party "believes and advocates the use of force and violence

whenever and wherever sufficient power is present to accomplish the purpose" (61 F. 2d at 568). Only then did the court hold alternatively that, even on the alien's view of the Party, it was proscribed. *Greco* v. *Haff*, 63 F. 2d 863, 864 (C. A. 9), is likewise contrary to petitioner's contention.[10]

In *Bridges* v. *Wixon*, 326 U. S. 135, there were no findings that the alien possessed knowledge of he unlawful character and aims of the organization which he was alleged to have joined or have affiliated himself with (see *Ex parte Bridges*, 49 F. Supp. 292, 301 (N. D. Cal.),[11] and the discussion *supra*, pp. 16–17), and this Court pointed out that "So far as this record shows the literature published by Harry Bridges, the utterances made by him * * * revealed a militant advocacy of the cause of trade-unionism. But they did not teach or advocate or advise the subversive conduct condemned by the statute" (326 U. S. at 148; see also p. 149). If petitioner's view of the statute were correct, the omission of any findings on Bridges' knowledge of the character of the proscribed

[10] Other cases declaring or assuming the irrelevance of the alien's knowledge are *Ungar* v. *Seaman*, 4 F. 2d 80, 81–2 (C. A. 8); *Fortmueller* v. *Commissioner*, 14 F. Supp. 484, 487 (S. D. N. Y.); and *United States* v. *Wallis*, 268 Fed. 413, 415–6 (S. D. N. Y.) (the latter two are discussed *infra*). See also *Harisiades* v. *Shaughnessy*, 187 F. 2d 137, 141 (C. A. 2), affirmed, 342 U. S. 580.

[11] *Ex parte Bridges*, 49 F. Supp. 292 (N. D. Cal.) states:

> Congress has made alien membership in or affiliation with proscribed organizations grounds for deportation without reference to knowledge on the alien's part of the proscribed character of the organizations with which he has affiliated himself.

organizations, coupled with this evidence of his personal beliefs, would certainly have made for summary disposition of the charge based on membership in the Communist Party. Hardly more than a paragraph pointing out the deficiencies in the record would have been required. But the Court did not dispose of the case on that ground; on the contrary it discussed at length the inadmissibility of O'Neil's testimony as to the alien's membership. The latter half of the opinion (326 U. S. at 149–156) can only be read as adopting the view that "membership" in the deportation statutes means no more than membership in the ordinary sense—the voluntary enrolling of oneself in an organization.

Some pre-1950 lower court cases, which have sometimes been cited as opposed to our view, are in fact fully consistent with that position. *Fortmueller* v. *Commissioner,* 14 F. Supp. 484, 485 (S. D. N. Y.), involved two charges of personal advocacy of violence; as to these, the evidence plainly had to deal with the alien's beliefs and it is in connection with these charges alone that the court discusses such evidence. On the third charge (membership in the Communist Party) (14 F. Supp. at 487), the court does not refer to the alien's own knowledge or belief. *United States* v. *Wallis,* 268 Fed. 413, 415–6 (S. D. N. Y.), held that mere proof of membership in the Party was sufficient, and upheld a deportation order even though the alien apparently claimed that he understood the Party not to contemplate violence. In *Branch* v. *Cahill,* 88 F. 2d 545, 546–7 (C. A. 9), and *United States ex rel.*

Lisafeld v. *Smith*, 2 F. 2d 90, 91 (W. D. N. Y.), there happened to be evidence of personal belief which the court, quite naturally, set forth in upholding the deportation order; this does not mean, of course, that such evidence was essential.[12]

The short of the matter is that we know of no case, under the prior statutes, declaring that knowledge is essential where the charge is *membership*, and several decisions (beginning in the early '20's) stating that it is not required, or acting on that premise.

C. No change was made in this interpretation by Public Law 14, the Act of March 28, 1951, 82d Cong., 1st Sess., 65 Stat 28, which is discussed in the *Galvan* opinion (347 U. S. at 526–528), as well as in our original brief in this case (at pp. 19–28). As shown by the materials on the 1951 Act which are collected in our main brief, Congress did intend to apply the deportation provisions of the 1950 Act only to aliens whose Party membership was voluntary, but the requirement of voluntariness did not entail, in addition to an absence of coercion or legal incapacity, a finding that the alien was aware of or sympathetic with the unlawful objectives of the organization. There is nothing in either the terms or the history of the 1951 statute which inserts such a requirement into the Internal Security Act, contrary to the consistent legislative pattern which, as we have shown, has existed since 1918. On the contrary, during the legislative deliberations which preceded the enactment of the 1951 Act, the sponsors of the measure repeatedly in-

[12] *United States ex rel. Kettunen* v. *Reimer*, 79 F. 2d 315, 317 (C. A. 2), involved "affiliation" and not "membership."

sisted that it was not their purpose in that Act or in the Internal Security Act of 1950 to change previous law and that they "did not intend to nullify or to disturb the body of judicial and administrative interpretations" defining membership in subversive organizations. See H. Rep. 118, p. 2, S. Rep. 111, p. 2, 82d Cong., 1st Sess. 97 Cong. Rec. 1370–1372, 1374, 1375, 2369, 2370, 2372–2373.

In summary, we have shown, that (a) the pertinent deportation provisions, both before and after their amendment in the 1950 Act, reveal a precise delineation between charges based on the alien's personal knowledge and beliefs and those predicated solely on his membership in designated organizations; (b) the legislative history of the Anarchist Deportation Acts of 1918 and 1920 shows that Congress intended to deport alien members of the prohibited groups, regardless of whether their membership was maintained with knowledge of the denounced objectives; (c) the legislative history of the Alien Registration Act of 1940 shows the same purpose; (d) administrative and judicial rulings since 1918 have taken the same position; and (e) neither in the Internal Security Act of 1950 nor in Public Law 14 (Act of March 28, 1951), 82d Cong., 1st Sess., 65 Stat. 28, did Congress change this meaning; it is inconceivable that the 1950 or the 1951 Acts retreated from the consistent three-decades-long legislative, administrative, and judicial construction of the prior law.

II

CONGRESS HAS THE POWER TO PROVIDE, AS IN SECTION 22 OF THE INTERNAL SECURITY ACT OF 1950, FOR THE DEPORTATION OF ALIENS WHO AT ANY TIME AFTER ENTRY HAVE BEEN MEMBERS OF THE COMMUNIST PARTY

The issue of the validity of provisions for the deportation of past members of subversive organizations has been three times passed upon by members of the Court. The constitutionality of the provision in the Act of June 28, 1940 (54 Stat. 670, 673, 8 U. S. C. 137) for the deportation of aliens who were formerly members of an organization which advocates or teaches the overthrow of the United States Government by force or violence was first presented in *Bridges* v. *Wixon*, 326 U. S. 135. The Court, as such, found it unnecessary to pass upon the constitutional issues. Four of the eight sitting justices[13] nevertheless expressed their views. Mr. Justice Murphy, in a concurring opinion, stated that the statute was unconstitutional. Chief Justice Stone, Mr. Justice Roberts, and Mr. Justice Frankfurter, dissenting, after considering non-constitutional arguments, declared (at p. 178) that:

> Petitioner has made a number of other arguments which the Court finds it unnecessary to discuss. We think that they too are without merit. We would affirm the judgment.

Among these arguments were the constitutional questions.

The second occasion was in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, in which the Court sustained that

---

[13] Mr. Justice Jackson did not participate.

provision of the 1940 Act. The third time, of course, was in *Galvan* v. *Press*, 347 U. S. 522. In the light of petitioner's attack on that decision, we shall discuss the issue almost entirely on the basis of the pre-*Galvan* materials.

A. DECISIONS OF CONGRESS TO DEPORT CLASSES OF ALIENS ARE POLITICAL DETERMINATIONS WHICH THIS COURT HAS HELD ARE NOT REVIEWABLE BY THE JUDICIARY

1. As this Court has recently emphasized (*Shaughnessy* v. *Mezei*, 345 U. S. 206, 210): "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." The enduring reasons for this judicial abstention were stated in *Harisiades* v. *Shaughnessy*, 342 U. S. 580. The Court pointed out that aliens, so long as they remain such, owe allegiance and loyalty to the state of their nationality which "could presently enter diplomatic remonstrance against * * * deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices". (342 U. S. at 585). The alien, "[b]y withholding his allegiance from the United States [he] leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect" (342 U. S. at 585–586). In wartime, though the resident alien may be personally loyal to this country, his foreign allegiance to an enemy state must prevail over his personal preference (342 U. S. at 587). "But it does not require war to bring the

power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure. That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state" (342 U. S. at 587–588). Significantly, the Court then observed (342 U. S. at 588–589):

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

The Court concluded (342 U. S. at 591) that, "in the present state of the world,"

> it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privi-

leges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.

The same considerations were stressed when the Court was first presented with the problem of the validity of a deportation statute, in 1893, in *Fong Yue Ting* v. *United States*, 149 U. S. 698. The Court then emphasized the powers of this country as a sovereign nation, the universal agreement that under international law each nation has full power to admit or expel any or all classes of aliens, and the intimate relation between this power over aliens and the international relations of the expelling country (149 U. S. at 705–711). On this basis, the Court concluded that "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power" (p. 713). Consequently, it held, in accordance with its prior decision in *The Chinese Exclusion Case*, 130 U. S. 581, that "The power to exclude or to expel aliens, *being a power affecting international relations*, is vested in the political departments of the government" (149 U. S. at 713, emphasis added).

In like vein, the Court said in *Mahler* v. *Eby*, 264 U. S. 32, 39, that "The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments." And

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318, referred to the power to "expel undesirable aliens" as one of the integral incidents of sovereignty which "exist as inherently inseparable from the conception of nationality."

Independently of authority, there is full warrant for the view that the power to expel is directly bound up with the foreign affairs of the nation and must be treated as such. A resident alien remains the citizen of a foreign country, entitled to its protection and subject to its jurisdiction. In its relations with an alien, the United States is not bound simply by domestic law, but also by international law and treaty obligations. When an alien enters this country, the United States assumes not merely a domestic obligation but also a foreign obligation to the country of which he is a national. For any of its acts with respect to an alien, this country may be required to answer to a foreign nation. Whether the United States should continue that foreign obligation, a source of diplomatic complaint, or should terminate it by expelling the alien, is obviously a political question. Cf. *Tiaco* v. *Forbes*, 288 U. S. 549, where the Chinese government requested that 12 Chinese citizens be expelled from the Philippines. Expulsion of aliens has frequently been the subject of treaties and diplomatic negotiations.[14] Expulsion has also been used as a powerful weapon of reprisal against similar actions by other countries.

---

[14] IV Moore, *Digest of International Law*, pp. 67, *et seq.*; *The Chinese Exclusion Case*, *supra*, 130 U. S. at 607-608.

Likewise, the power to expel aliens exists, at least in part, as a protection against foreign dangers and and for this reason, too, lies squarely within the field of international relations. The alien's foreign allegiance binds him by an external tie which may be used to our detriment—an injury against which Congress is entitled to guard.

2. These are the considerations which have led the Court repeatedly to hold and declare, in the more than 60 year span since 1893, that the substantive aspects of deportation legislation are subject only to minimal judicial review, if any at all. As already noted, the doctrine initially derived from decisions of the Court which established legislative finality with respect to the *exclusion* of aliens. That principle was firmly stated in the opinion in *The Chinese Exclusion Case*, 130 U. S. 581, 605, 606–607, where the Court observed that either in time of peace or in wartime, if the Government "through its legislative department" finds the presence of a class of foreigners to be inimical to our security, the legislature's determination is "conclusive upon the judiciary." Subsequently, in the first *expulsion* case, *Fong Yue Ting* v. *United States*, 149 U. S. 698, the Court summarized the differing positions of the legislative and the judicial branches in this field:

> [1] The Court should "be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government" (149 U. S. at 712);
>
> [2] "The power to exclude or to expel aliens,

being a power affecting international relations, is vested in the political departments of the government * * *" (149 U. S. at 713); and

[3] Accordingly, "The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject." (149 U. S. at 731.)

Aliens "remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest" (149 U. S. at 724).

Such unrestrained power to terminate the residence of aliens, the Court explained, was not inconsistent with prior decisions holding that resident aliens enjoyed the protection of constitutional safeguards, including the due process clause. Referring to *Yick Wo* v. *Hopkins*, 118 U. S. 356, holding that aliens were protected by the due process and equal protection clauses of the Fourteenth Amendment, the Court declared: "The question there was of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country" (149 U. S. at 725). Thus, while resident aliens are entitled to the privileges and immunities guaranteed by

th Constitution in domestic matters, including procedural due process in deportation proceedings (see, *e. g., Japanese Immigrant Case*, 189 U. S. 86, 100; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33), the designation by Congress of classes of undesirable and deportable or excludable aliens pertains to international relations and is a political determination which "is conclusive upon the judiciary." *The Chinese Exclusion Case*, *supra*, 130 U. S. at 606.

No later decision of this Court has repudiated or modified this principle of full Congressional power to deport; and the Court has frequently reasserted it. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 545, 547; *Wong Wing* v. *United States*, 163 U. S. 228, 231, 235, 237; *Li Sing* v. *United States*, 180 U. S. 486, 495; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 302; *Japanese Immigrant Case*, 189 U. S. 86, 97–100; *Turner* v. *Williams*, 194 U. S. 279, 289–291; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 467–8; *Tiaco* v. *Forbes*, 228 U. S. 549, 556–557; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Ng Fung Ho* v. *White*, 259 U. S. 276, 280; *Mahler* v. *Eby*, 264 U. S. 32, 39, 40; *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Carlson* v. *Landon*, 342 U. S. 524, 534; *Shaughnessy* v. *Mezei*, 345 U. S. 206, 210; cf. *United States* v. *Ju Toy*, 198 U. S. 253, 261; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275; *Lapina* v. *Williams*, 232 U. S. 78, 88; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 597–8; cf. *Lehmann* v. *Carson*, 353 U. S. 685; *Mulcahey* v. *Ca-*

talanotte, 353 U. S. 692; *Rabang* v. *Boyd*, 353 U. S. 427.[15]

Prior to *Galvan, Harisiades* v. *Shaughnessy*, 342 U. S. 580, was the last application of the doctrine. The Court was asked to decide whether a provision calling for the expulsion of aliens who had at any time after entry into the United States belonged to an organization advocating the violent overthrow of the Government[16] violated the due process clause of the Fifth Amendment. As in past decisions in this area, the Court observed that (342 U. S. at 589):

---

[15] Cases which have sometimes been cited as modifying this principle have all involved determinations by the executive that a certain alien was a member of a deportable class previously established by the legislature, rather than a decision of Congress to deport a class of aliens whom it deemed undesirable residents. Only the latter is a political decision on a matter fundamentally affecting the public security. The administrative determination that a particular alien is a member of that class is a quasi-judicial determination, in the making of which the procedure employed must conform to procedural due process, since resident aliens are accorded the protection of the Constitution (*Yick Wo* v. *Hopkins*, *supra*; *Japanese Immigrant Case*, *supra*; *Wong Yang Sung* v. *McGrath*, *supra*). These cases do not hold, or state, that the due process clause restricts congressional decision with respect to the deportability of a class of undesirable aliens. Indeed, the very cases holding aliens entitled to procedural due process cite with approval the substantive constitutional doctrine of the *Fong Yue Ting* case. A recent instance is *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 597–598, where this Court, citing the *Fong Yue Ting* case, declared, "Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."

[16] Section 23 (a) of the Alien Registration Act of 1940, 8 U. S. C. 137.

> Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

See, also, *supra*, pp. 25–27.

It is true that the Court refrained from making an explicit reassertion of the proposition that under the Constitution the judiciary is without any power to override a legislative finding that a particular class of aliens is deportable, stating that the acknowledged "restraints upon the judiciary," while pertinent, did "not control today's decision * * *" (342 U. S. at 589–590). There was not, however, any repudiation of the general legislative finality first established by the *Fong Yue Ting* case, *supra*. On the merits, the deportation provision in question was held to be a reasonable one in the light of the Congressional power and Congressional responsibility in the area of foreign affairs and national security. And on the same day as *Harisiades* the Court used, in *Carlson* v. *Landon*, 342 U. S. 524, 534, words which are directly linked to the historic principle of the *Fong Yue Ting* case:

> So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the *plenary power of Congress* to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders. [Emphasis added.]

The *Harisiades* and *Carlson* cases, while perhaps withholding final judgment as to whether the judi-

ciary is devoid of *all* power to review an expulsion measure, at least make it clear that such a measure must be allowed to stand unless it can be said that the menace perceived by Congress is a "fantasy or a pretense," that there are "no possible grounds on which Congress might believe" that continued American residence of the designated class of aliens was "inimical to our security" (342 U. S. at 590). Judicial review of a legislative determination that a certain class of aliens is undesirable or a threat to our security is thus very narrowly circumscribed. Where Congressional power is "plenary", judicial authority to restrain is necessarily at its minimum.

3. In the more than sixty years since *Fong Yue Ting* was decided in 1893, the federal courts have consistently recognized and applied deportation provisions which have seemed to many—including some of the judges who have enforced them—to be harsh, discriminatory, or unfair. These laws have been upheld and enforced because the responsibility has been wholly Congress', and the courts have not swerved from a conscientious adherence to the view that the judicial branch has no concern with the "wisdom", "policy", "justice", or "severity" of these measures. *Fong Yue Ting* v. *United States,* 149 U. S. at 731; *Li Sing* v. *United States,* 180 U. S. 486, 495.

The *Fong Yue Ting* case itself upheld a statute which permitted the deportation of a Chinese laborer who had lawfully entered and had lived here for over a decade, solely because he could not prove his lawful residence by a white witness, as required by the

statute and regulations, although he could and did prove that he was entitled to remain by Chinese witnesses. 149 U. S. at 703–4, 729–730, 732.[17] And where a Chinese person claimed American citizenship, the burden of proving non-alienage rested on him, although in all other cases the Government had the burden of showing alienage. See *Bilokumsky* v. *Tod*, 263 U. S. 149, 153.

Turner v. *Williams*, 194 U. S. 279, indicated that Congress would be competent to exclude or deport aliens who were anarchists only in the sense that they philosophically opposed all organized government, but who did not believe in achieving that ideal through force. 194 U. S. at 294.[18] Through Mr. Justice Holmes, *Tiaco* v. *Forbes*, 228 U. S. 549, affirming 16 Phil. 534, sustained what was in effect a private deportation act by the Philippine legislature ratifying the Governor General's executive expulsion of 12 resi-

[17] Previously, the Court had held in *The Chinese Exclusion Case*, 130 U. S. 581, that Congress could exclude a Chinese alien who, after lawful residence in the United States for 12 years (1875–1887), had taken a temporary trip to China, and had returned to this country one week after the passage of the Chinese Exclusion Act of 1888, even though he had been issued a certificate when he left entitling him to reenter and the Exclusion Act had become law after he departed from China on his return voyage. This was an exclusion case, but the alien had had a twelve-year residence in the United States. Cf. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590.

[18] Turner was arrested some 10 days after his entry and ordered deported on the ground that he came into the country in violation of the prohibition on entry of anarchists. 194 U. S. at 281.

dent Chinese aliens who were considered by him to be undesirable and a menace to public order; no hearing was held. The Court expressly declared that Congress could have taken the same action.

Ludecke v. *Watkins*, 335 U. S. 160, upheld the executive's power under the Alien Enemy Act of 1798 to remove, after the close of hostilities, enemy aliens some of whom might be personally loyal to the United States. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 587, and *infra*, pp. 69–71. Similarly, aliens have been held deportable for knowingly having in their possession, for the purpose of distribution, printed matter advocating the forcible overthrow of the Government, although there was no proof that they personally held that conviction. *Tisi* v. *Tod*, 264 U. S. 131 (per Brandeis, J.). With the admonition that "judicially, we must tolerate what personally we may regard as a legislative mistake" (342 U. S. at 590), *Harisiades* sustained the deportation of past Communists who may have fully cleansed themselves of all Party taint and who, even while members, did not personally advocate violence or know the Party's tenets. See *infra*, p. 42, fn. 24.

Because the statute required deportation of aliens twice convicted of crimes involving moral turpitude, the Second Circuit, through Judge Learned Hand, upheld a deportation order against a young American-reared alien twice found guilty of burglary, even though it thought that deportation would be "deplorable", with a "cruel and barbarous result" which would be a "national reproach". *United States ex rel.*

Klonis v. *Davis*, 13 F. 2d 630 (C. A. 2).[19] Though the case was extreme and the judge unusually outspoken, these words epitomize the traditional judicial attitude, both in this Court and the lower federal courts, toward deportation legislation—the power and the responsibility belong to Congress and the courts cannot and should not intervene in judgment, no matter how appealing the alien's contention or severe the legislative decree.[20]

4. These settled principles prove the basic error in the repeatedly used analogy to cases concerning public employment and public office. Aliens are not in

---

[19] The court said (13 F. 2d 630, 630–1):

> At any rate we think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.

[20] For other pointed expressions of this attitude, see *The Chinese Exclusion Case*, 130 U. S. 581, 609; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 731; *Li Sing* v. *United States*, 180 U. S. 486, 495; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590, 596–598; *Shaughnessy* v. *Mezei*, 345 U. S. 206, 216; *Latva* v. *Nicolls*, 106 F. Supp. 658 (D. Mass.).

the same category as citizens who are public servants or seek to become such, or who seek to enter occupations or professions. The latter, because they are citizens and full members of the American body politic, have certain substantive rights against discriminatory treatment—*e. g.*, because of race, or color, or belief—which the courts will protect even as against legislatures. See *Wieman* v. *Updegraff*, 344 U. S. 183, 191–2; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232. But the alien, as every opinion since the *Chinese Exclusion* case shows (*supra*, pp. 29–34), has a different and much more precarious status when the question is one of his exclusion or expulsion. He is not a full member of the political community, and the legislature's power to separate or exclude him is not limited, as with citizens, but "plenary" (342 U. S. at 534) and "largely immune from judicial control" (345 U. S. at 210). "Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose" (*Harisiades* v. *Shaughnessy*, 342 U. S. 580, 586–7, footnotes omitted).

A simple historical comparison of the statutory classes of excludable and deportable aliens with the legislative categories of persons who must be excluded

or separated from the public service demonstrates that alien legislation has been founded on racial and other considerations normally inadmissible in the regulation of government employment.[21] The Chinese exclusion and deportation laws are, of course, the prime example (see, *supra*, pp. 29–30, 34–35; *infra*, pp. 68–69); the national origin and quota systems are others. See also *Turner* v. *Williams*, 194 U. S. 279, 294 (alien anarchists). The best that can be said for the analogy is that, if a substantive deportation provision is (like public employment legislation) to be measured by some theory of reasonableness or arbitrariness, the standard of acceptability is much lower[21a] and many considerations forbidden in the area of public employment may properly be taken into account.

This fundamental differentiation stems, as the Court has pointed out (342 U. S. at 585 *ff*), from the root fact that the alien, so long as he does not become naturalized, is not fused into the American community. He bears neither the full obligations of the

---

[21] For an older listing of deportation provisions, see Clark, *Deportation of Aliens from the United States to Europe* (1931), pp. 60–69; and Van Vleck, *The Administrative Control of Aliens* (1932), pp. 3–22, 83, *et seq.* The current general deportation provisions are contained in Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204. The exclusion process is discussed in *Van Vleck, op. cit., supra*, at 3–22, 33 *ff*.

[21a] See *Harisiades*, 342 U. S. at 590 ("a fantasy or a pretense"; "no possible grounds"), affirming 187 F. 2d 137 (C. A. 2) at 141 (giving as an example of an assumedly invalid statute, "that all blue-eyed aliens be deported").

citizen nor the citizen's undivided allegiance to this country; and Congress can rightly consider that his failure to become naturalized generally bespeaks an indifference to, or rejection of, full participation in American life. In this clashing world of sovereign states, moreover, the country cannot unilaterally deprive itself of a recognized and traditional "power of defense and reprisal"—often harsh and "bristl[ing] with severities"—against the unfriendly or unfavorable actions of foreign states. 342 U. S. at 587–589, 591. The alien's tenuous status is the price he must pay for not unequivocally throwing in his lot with this nation in a world which is not yet one.

B. THE DETERMINATION BY CONGRESS IN SECTION 22 TO MAKE DEPORTABLE ALIENS WHO AT ANY TIME AFTER ENTRY HAVE BEEN MEMBERS OF THE COMMUNIST PARTY IS AMPLY SUPPORTED BY THE LEGISLATIVE FINDINGS AND BY ADMINISTRATIVE AND JUDICIAL DECISIONS

If Congressional power to deport is plenary, as the decisions of this Court suggest (*supra*, pp. 29–34),[22] there is little need to go further in order to uphold the

[22] Congress appears to have viewed its power as absolute. See S. Rep. 2230, 81st Cong., 2d Sess., p. 26 (reporting on the very provision here in issue):

> It is well established by numerous decisions of the Supreme Court that every sovereign nation has the power, inherent in its sovereignty, to forbid the entrance of aliens or to admit them upon such conditions as it may prescribe (*United States ex rel. Knauff* v. *Shaughnessy*, Supreme Court, Jan. 16, 1950; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 1892). A corollary to that essential power for its self-preservation is the inherent power of

validity of Section 22 of the Internal Security Act of 1950. Congress has made its meaning plain; it has ordered the deportation of aliens who, at any time after entry, became members of the Communist Party, even though they are no longer members when deportation proceedings are begun and even though there is no proof that they were aware of the Party's unlawful objectives. Under the slight measure of judicial review which remains, the statute must be upheld.

1. *The Harisiades and Carlson rulings, and their background.*—Not only does the *Harisiades* decision affirm that the judiciary assumes, at the very most, a subordinate role in reviewing Congressional deter-

---

a sovereign to deport aliens. (See *Tiaco* v. *Forbes*, 228 U. S. 549, 1913.) The authority of Congress over the admission of aliens is plenary, and it may exclude them altogether or prescribe the terms and conditions upon which they may enter and remain in the country. (See *Lapina* v. *Williams*, 232 U. S. 78, 1914; *Wong Wing* v. *United States*, 163 U. S. 228, 1896.)

See also the following statement by Senator Ashurst during the debate on the 1940 Act (86 Cong. Rec. 8345):

> The United States has plenary power to invite any alien here it chooses to invite, and to exclude an alien at any time for a good reason, for a bad reason, or for no reason at all. The United States has full power, acting within its sovereignty, and it is not a breach of any alien's constitutional rights, to bar him at any time for any reason, or for no reason. In other words, a citizen need not give a reason why he invites a guest, and upon a guest there is certainly imposed the duty of behaving himself as well as the family behaves itself, and if an alien misbehaves, the sovereign plenary power of the Government is complete and full to exclude him at any time.

minations regarding the expulsion of undesirable aliens, but in holding that, on the merits, the provision there in question did not infringe the due process clause of the Fifth Amendment, the decision goes practically the whole road (together with *Carlson* v. *Landon*, 342 U. S. 524) toward validation of Section 22 of the 1950 Act.

(*a*). In *Harisiades*, the Court upheld the constitutionality of Section 23 of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, which made subject to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the government of the United States by force and violence.[23] The organization involved was the Communist Party of the United States, the aliens had discontinued their membership, and the cases were decided on the assumption that they had not personally shared or known the purpose of the organization (see 342 U. S. at 582–3).[24]

---

[23] The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law, and an infringement of the First and Fifth Amendments.

[24] The records in the three cases reported under *Harisiades* v. *Shaughnessy* are perfectly clear that there were no final administrative or judicial findings on the matters of personal belief in force or knowledge that the Party advocated force. As to Harisiades, the Board of Immigration Appeals expressly found "that the evidence of record does not establish that the respondent personally believed in or advocated the overthrow of the Government of the United States by force or violence" (Oct. Term 1951, No. 43, R. 873). Harisiades testified that force was to be used by the Party only defensively, and that he did not himself believe in the use of force and violence (No. 43, R. 38–48).

Coleman testified at her deportation hearing that she never heard anyone advocating the overthrow of the government

The attack on that statute was the same as that now made. No one disputed that there would be good

---

by force or violence and she herself did not believe in it (Oct. Term 1951, No. 264, Tr. 82). There was no finding of personal advocacy of force or of knowledge that the Party advocated force.

Mascitti testified at his hearing that he heard some speakers advocating the use of violence, that he did not personally believe in the forcible overthrow of the government, that he was not entirely clear as to what the policy of the Party was in that respect, and that he resigned when he discovered, or thought through, the aims and precepts of the Party (Oct. Term 1951, No. 206, Tr. 46–50, 78, 82–3). He also testified that he knew that the Party advocated the establishment of proletarian dictatorship by force or violence in the event that the capitalist class resisted, but that he did not believe that this would happen in the foreseeable future (No. 206, Tr. 17, 46, 48, 49). It was argued to the Board of Immigration Appeals that Mascitti did not know of the unlawful objectives of the Party, but the Board held that it was unnecessary to prove knowledge and also that membership, attendance at meetings, and reading Party literature is automatically equivalent to knowledge (No. 206, R. 17).

The Government presented these cases on the assumption that the aliens did not personally advocate force and did not know of the Party's advocacy of force. In its brief (Brief for the United States, Oct. Term 1951, Nos. 43, 206, 264) at p. 91, the Government stated:

> some former members of the organization may have been unaware of or not in personal agreement with the policy of forcible overthrow. On these records, it must be assumed that there is no proof that these appellants had such personal beliefs or knowledge. In view of its interpretation of the statute as not requiring proof of more than past membership and the nature of the organization, the Immigration Service had not deemed it necessary to introduce evidence on these subjective matters in its deportation proceedings.

See also pp. 31–49, 87–89, of the Government's brief to the same effect.

437512—57—4

reason for deporting aliens who are presently members, with full knowledge of the aims, of an organization advocating violent overthrow of the United States Government. The attack was on the ground that the statute required deportation of past members of such organizations, without regard to whether the alien remained a member, and without regard to whether he was proved to have personally advocated forcible overthrow or to have been aware that the organization so advocated. As the Court pointed out, several reasons caused Congress to conclude that the public welfare required deportation even in such cases.

(*i*). The bill which became the amendment of 1940 was before Congress when *Kessler* v. *Strecker*, 307 U. S. 22, was decided in 1939. The sponsors of the legislation, Representatives Smith of Virginia and Hobbs of Alabama, believing that the decision holding past membership in a subversive organization not to be grounds for deportation was contrary to what they regarded as "the clear language of the [prior] law" (84 Cong. Rec. 10449; Hearings before Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., on H. R. 5138, p. 14),[25] inserted in the bill then before the House a provision which would make the legislative intent clear beyond peradventure (Hearings, *supra*, p. 12).

In explaining the reason for the amendment, it was repeatedly stated that the *Strecker* decision permitted an alien to evade deportation by resigning from the

[25] Representative Hobbs stated that "with all due respect, that seems to be a rather strained construction" (84 Cong. Rec. 10449).

organization before the Government could catch up with him. Thus, Representative Smith stated (84 Cong. Rec. 9537):

> This amendment changes that so as to avoid the situation where a person who, upon being suspected, could resign from that organization and say, "I was a member of that organization last week but I have resigned and you cannot deport me." That is exactly the situation under the law in the Strecker case. This makes it plain that a person who advocates the overthrow of this Government by force, and belongs to a party that recommends that to its people, shall be deported whether he belongs to it now or whether he belonged to it yesterday or last year, if he is an alien.

Representative Hobbs, in explaining the House bill before the Senate Committee (Hearings, *supra*, p. 16), had previously declared:

> We do not believe that because "Joe" Strecker, after the third hearing which was granted to him by law, and the adroit coaching of his lawyer, which is admitted in the record, said, "Why, I had my fingers crossed; I have quit; I have resigned"—we do not think that is any reason on earth to keep "Joe" Strecker here. * * *.

Representative Robsion of the House Judiciary Committee stated in the same connection (84 Cong. Rec. 10367):

> Those opposing this bill want the law to remain as it is. It provides for the deportation of Communists, anarchists, and so forth, but a recent decision of the Supreme Court in the

noted Strecker deportation case held that the Government would have to prove that these aliens were anarchists or Communists at the time deportation proceedings were instituted. These Communists and anarchists and other such groups seeking to overthrow this Government, found a way to get around the law. Their leaders advised their members to say when they were arrested, "Yes, we did belong to the Communists or anarchists, but some time ago we resigned. We decided not to belong to the organization any longer."

Strecker, a Communist alien, was apprehended. He readily admitted that he had been a Communist, he had his membership card, but claimed that he had recently resigned from that party. The Supreme Court held that in view of that statement Strecker could not be deported.

* * * * *

* * * Without this new law, anarchists, Communists, and other like organizations will continue to flourish and grow and endanger the very life of this Nation, its citizens, and their property.

Representative Blackney summarized the view which prevailed as follows (p. 10365):

This amendment changes that so as to avoid the situation where a person, who, upon being suspected, could resign from that organiation and say, "I was formerly a member of that organization, but I have now resigned."[26]

[26] During the debate on the Anarchist Deportation Act of 1918, Representative Burnett, Chairman of the House Committee on Immigration and Naturalization, rejected a suggestion that deported subversives be permitted to return, upon

These were Congress's reasons for making past membership in the party grounds for deportation. It considered that voluntary withdrawal from membership may often be a mere subterfuge, not affecting adherence to fundamental principles.

(*ii*). Congress also realized that the 1940 amendment might reach aliens who had reformed, but felt nevertheless that such aliens were undesirable aliens not entitled to the continued hospitality of this country. In successfully opposing an amendment which would have excepted persons who had abandoned membership in good faith for five years, Representative Hobbs declared (84 Cong. Rec. 10448–9):

> I shall give the underlying philosophy of this section. It is that in this day and time we have floods of applications from perfectly good aliens who want to come here and make their homes and make the same splendid contribution to our civilization that good aliens have throughout the ages. This country has been builded by good aliens who have come here and have worked wonderfully with the good people of this Nation.
>
> We are all aliens, if you trace the family tree far enough, so we have no prejudice against aliens. With the world to select from, with the cream of the alien world seeking admission, when we are unable to accommodate millions be-

---

a showing that they had "sincerely reformed," stating (56 Cong. Rec. 8122):

> I think not; and I do not think we should adopt anything that would, because it would open the door to too many cases of *pretended reformation*. [Emphasis added.]

cause of our quota limitations, why not select the best? Why insist upon keeping some of the worst? They may have sinned only once, but there are thousands who have never sinned. I prefer those. You may as well say that one slip, one sin, does not militate against chastity. No matter how long since, nor for how short a time, anyone may have knowingly and voluntarily strayed from the straight and narrow path of virtue, he cannot be sinless. Of course there is virtue in sincere repentance. Many really reform. Forgiveness is a divine attribute, which we should practice whenever possible. We are perfectly willing to forgive every one of those aliens who brought or bring themselves within the purview of this title. This title inflicts no punishment upon any of them: it says to them, "Go and sin no more."

They came to our home and plotted the destruction of our Government that bade them welcome, but all we do here is to send them—not to prison or gallows—but back to their own home.

Though we deal only in such kindly fashion with them, we feel in duty bound to prefer those who have never been guilty of allowing themselves to be inoculated with the poison virus of those alien isms that seek to destroy our Government by violence. That is the issue.

See also the Senate Hearings, *supra,* pp. 14–15, in which Representative Hobbs stated:

Now, then, is that harsh? We think not, and for this reason, Senator Danaher—since this was your question, I am directing my answer primarily to you—for this reason: This is not a question of a criminal prosecution. This

is not a question of dealing with the vested rights of anyone. No alien has any vested right to remain here. * * *

Now, the thought back of this amendment is simply this—that we have at this time in the history of the world the rarest opportunity that has ever come to America to select the best of those who wish to come here, and every one of these who has been at any time a member of a subversive faction advocating the overthrow either of all government or of this Government can well be replaced from the standpoint of the good of America by someone who has never been diseased with that mania. In other words, says that I was in Italy before I came here; I am an immigrant; say that I was a member of the Communist Party, and I believed wholeheartedly in its principle of the destruction of all organized government; I am an anarchist; I am one of the dirk wielders; I am one of the strong-arm boys. Now, I get religion, or any other uplifting influence comes into my life, or I completely recant. Well, that may be permanent, or it may not; but we said we would rather had one who had never been; and it is our choice. Now, there are plenty of good people in Italy who have never sinned in that regard; who have always believed in some established government; who have never sunk a dirk in one's back.

He also stated (84 Cong. Rec. 10359):

Aliens in the United States are exactly analogous to visitors in your home. No guest in your home has the same rights as do your children. They have no vested right to remain here.

In short, the view of Congress was that it can select and limit the number and kind of aliens it wishes to allow to remain in the United States; aliens who were at any time connected with a subversive organization are less desirable than others; although such aliens may reform, past members of such organizations are more likely to be susceptible in the future to the "poison virus" and therefore to become dangerous, or at least undesirable, residents of the United States. Even though this may not be true of all of them, classifying the group, as such, as undesirable for purposes of deportation is not an arbitrary or irrational judgment to be overturned by the courts.

(*b*). The present case (and *Galvan*) are almost the same as *Harisiades*. Petitioner has been ordered deported because of his discontinued Communist Party membership, in the absence of a showing of subjective advocacy of the Party's ends. The sole distinction is that in *Harisiades* there were administrative findings that at the time the aliens belonged to the Communist Party it taught and advocated the overthrow of the government of the United States by force and violence, while under Section 22 of the 1950 Act, because it makes past or present membership in the Communist Party *per se* grounds for deportation, no such finding is necessary. As a result, there has been no occasion for petitioner to show that at the time of his membership the Party did not advocate the violent overthrow of the government.

The argument that the vice of the 1950 Act is this lack of opportunity to show that the Party did not advocate forcible overthrow was seriously undermined,

at its very foundation, by the explicit declaration in *Carlson* v. *Landon*, 342 U. S. 524, decided the same day as *Harisiades*, that "We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens" (342 U. S. at 535–536). This was said with direct reference to Section 22 of the Internal Security Act,[27] and the only difference was that the aliens in the *Carlson* case were charged with present membership in the Communist Party.

There would seem little reason to accord less standing, in a deportation case, to a solemn Congressional declaration as to the past status of the Communist Party than to a finding directed to the present. In any event, *Harisiades* disposed of the contention that the alien charged with past membership must, unlike

---

[27] The Court said immediately before the sentence we have quoted in the text (342 U. S. at 534–535):

> Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation. The passage of the Internal Security Act of 1950 marked such a change of attitude toward alien members of the Communist Party of the United States. Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation. The reasons for the exercise of power are summarized in Title I of the Internal Security Act.

the present member, be accorded a hearing on the nature of the Communist Party. The Court held that Congress in "exercising the wide discretion that it alone has in these matters * * *" could eliminate the administrative burden of proving in each case that an alien who had discontinued his Communist Party membership had not "sincerely renounced Communist principles of force and violence * * *" (342 U. S. at 595–596). Under that statute aliens were given no opportunity to present testimony that at the time of the deportation proceeding they were, as individuals, no longer a threat to our national security. Because Congress has such wide discretion in this area, and because there was reason for Congress to believe that in many cases, if not in most, aliens who ostensibly discontinued their Party membership did not do so in fact, this provision was held not to violate the due process or *ex post facto* clause (see 342 U. S. at 593–596). Significantly, the Court treated the 1940 deportation provision, there involved, as directed mainly at Communists, and paid much attention to the nature and activities of the Communist Party, particularly as Congress had a right to view it. See 342 U. S. at 590–1, 593–4, 595–6.

The statutory change embodied in Section 22 of the 1950 Act also sought to lift from the government a difficult and unnecessary administrative burden, namely, that of introducing again and again in deportation proceedings evidence as to the nature and activities of the Communist Party.[28] This action by

[28] See *infra*, pp. 62–65, for a recital of (a) the legislative findings in the 1950 Act on the nature of the Communist Party,

Congress is fully sustained by the Court's holding in *Harisiades* that it was proper for Congress to eliminate the burden of distinguishing between sincere and fraudulent disaffiliations from the Communist Party. Even assuming that in the past 30 years there may have been intervals during which the Party did not advocate doctrines inimical to our security (but see *infra*, pp. 55 *ff*), the administrative task of ascertaining whether a particular alien's membership coincided precisely with such an interval is similar to, and at least as onerous as, that eliminated by the 1940 provision upheld in *Harisiades*. In fact, the very problem which Congress sought to obviate by the earlier provision would be repeatedly raised if petitioner (and others) were to be allowed to claim as a defense that the Party during their terms of membership had only innocent purposes. It would then become necessary in each case to determine whether the alien's apparent disaffiliation at the time the Party resumed its advocacy of violent overthrow of the government was sincere and genuine and not merely a subterfuge. Moreover, not only would the individual alien's motives in leaving the Party have to be examined, but it would also be necessary to ascertain whether the Communist Party had during the period in question actually relinquished its usual aims and methods.[29] On the basis of this Court's holding in *Harisiades*, Congress has the power to de-

(b) the court decisions on that issue, and (c) the number of deportation cases involving the issue since 1920.

[29] Congress was concerned with this problem. See *infra*, pp. 61–62.

cide that this need not be the government's burden, but that the operating postulate is to be that the Party has always advocated the use of force. And to deprive the alien of the right to show otherwise—not a significant right, in actual fact (see *infra*, pp. 55 *ff*)—is surely no more inadmissible than to make irrelevant a showing of reformation and change, a showing which some aliens could make with far greater ease and possibility of success than they could demonstrate that the Communist Party did not advocate force.

In short, the *Carlson* and *Harisiades* cases—read together against the prior rulings of this Court and the history of deportation legislation—make clear that alien Communists are deportable, and that Congress can reasonably provide that discontinuance of membership in the Communist Party need not be taken into account. In those cases, the Court took its stand (as we have already recalled) on the breadth of the legislative power. It upheld what was regarded in historical context as "an extreme application of the expulsion power" (342 U. S. at 588). The Court thought that "in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation". The "world-wide amelioration of the lot of aliens * * * is peculiarly a subject for international diplomacy" and "reform in this field must be entrusted" to the political branches. 342 U. S. at 591. If there is to be a policy of forgiveness and recognition of reformation, it is for Congress to provide (342 U. S. at 595).

2. *The particular history of Section 22 of the 1950 Act.*—Unlike the prior statute, the 1950 Act does expressly name the Communist Party. We believe, as we have argued (*supra*, pp. 41 *ff*), that the reasoning and holdings of the *Harisiades* and *Carlson* cases, together with the accepted principles in the field of deportation, support Section 22 even on the assumption that there may have been isolated periods when the Communist Party did not teach and advocate the violent overthrow of the Government. But it is not necessary to make that assumption. The history of Section 22 discloses an extensive background of exhaustive study culminating in a finding by Congress that the Communist Party of the United States has at all times been a threat to the national security. We turn to consider this legislative history, as well as the judicial and administrative decisions which have consistently upheld the same conclusion as that reached by Congress with regard to the menacing character of the Communist Party.

In 1931, a special committee of the House investigated and reported on Communist propaganda in the United States (H. Rep. 2290, 71st Cong., 3d Sess.). That committee cited the language of the program of the Communist Party as established by the Comintern at the Sixth World Congress, September 1, 1929, at Moscow to the effect that (H. Rep. 2290, *supra*, p. 15):

> The communists consider it unworthy to dissimulate their opinions or their plans. They

> proclaim openly that their designs can only be realized by the violent overthrow of the entire traditional social order.

The report concluded that (H. Rep. 2290, *supra*, pp. 65–66):

> It is self-evident that the communists and their sympathizers have only one real object in view, not to obtain control of the Government of the United States through peaceful and legal political methods as a political party, but to establish by force and violence in the United States and in all other nations a "soviet socialist republic" to which they often refer in their literature as a "dictatorship of the proletariat." These facts have been repeatedly substantiated at the hearings of the committee.

In 1935, the McCormack committee of the House, which was charged with the investigation of Nazi and other propaganda, found "both from documentary evidence submitted to the committee and from the frank admission of Communist leaders * * *" that the objectives of the Party included the overthrow by force and violence of the Government of the United States. H. Rep. 153, 74th Cong., 1st Sess. (1935), p. 12. It concluded that the Party "is a party recognized on an international scale, governed and controlled by a constitution and rules emanating from the Communist International with headquarters at Moscow in the Soviet Union, and dedicated to the overthrow of the government by violence and force." H. Rep. 153, *supra*, p. 21.

In 1939, extensive hearings before the House Committee on Un-American Activities informed Congress

that in 1929 the Soviet Union, acting through the Communist International, ejected Lovestone and Gitlow from the leadership of the Communist Party of the United States and replaced them with Foster and Browder.[30] Current evidence of foreign control of the Party was furnished to Congress when, with the signing of the Hitler-Stalin Pact in August 1939, resistance to Nazi aggression suddenly became an "imperialistic war" in the view of American Communists. Also, between 1938 and April 1940, Congress had observed how the ideological allies of Hitler in Austria, Czechoslovakia and Norway had aided in subjecting those countries to Nazi rule.

Thus, by 1940, Congress was not merely concerned with the old-fashioned concept of domestic insurrection, but with the more subtle and dangerous situation in which a local totalitarian political group, whether Communist or Nazi, is the actual or potential fifth column ally of the totalitarian government by which it is controlled. Section 23 (a) of the Alien Registration Act of 1940, in making deportable aliens who had at any time been members of a group advocating the violent overthrow of the Government, was part of a larger statute, part of which, known as the Smith Act, was upheld by the Court (as there applied) in *Dennis* v. *United States*, 341 U. S. 494, and part of which required the registration of aliens. The same Congress also enacted the Voorhis Act of October 17, 1940,[31] requiring the registration of "Every organiza-

[30] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Cong., 1st Sess. (1939), vol. 7, pp. 4432, 4671.

[31] 54 Stat. 1201, 18 U. S. C. 2386.

tion subject to foreign control which engages in political activity," and understood that the Communist Party of the United States would be required to register.[32] The *Harisiades* opinion expressly recognizes that the 1940 Congress directed the deportation provision there in question against alien Communists because of "alarm about a coalition of Communist power without and Communist conspiracy within the United States" (see 342 U. S. at 590–1).

Between 1940 and 1950, Congress observed that Communist parties everywhere are simply the fifth column of Soviet aggression. Where they have obtained power, as in Czechoslovakia, they have done so by violence, destroyed their political opponents, and degraded their native lands into satellites of the Soviet Union. Where they have not obtained power, they carry on, in the United States and elsewhere, espionage, sabotage, and propaganda on behalf of the Soviet Union. American troops fought with the United Nations in Korea to check Communist aggression, while this country has entered into costly and unparalleled military alliances to discourage Communist aggression elsewhere.

Section 22 of the Internal Security Act originated in S. 1832, 81st Cong., 2d Sess., which was passed by the Senate on August 9, 1950, and was later incor-

[32] H. Rep. 2582, 76th Cong., 3d Sess. Immediately, the Communist Party of the United States ostensibly withdrew from the Communist International to avoid registration under the Voorhis Act. See resolution adopted at the 1940 Convention of the Communist Party, reproduced in the record in *Dennis* v. *United States*, 341 U. S. 494, vol. XIV, pp. 11180–11181.

porated by the Senate into the internal security bill (S. 4037, 81st Cong., 2d Sess.). S. 1832 was introduced by Senator McCarran in May 1949,[33] and was the subject of extensive hearings, between May and September 1949, before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, under the heading of *Communist Activities Among Aliens and National Groups.*

After these hearings, S. 1832 was revised to provide, *inter alia*, for the deportation of aliens who have at any time been members of the Communist Party of the United States. It was passed by the Senate without debate (96 Cong. Rec. 12058, 12060). However, the accompanying report of the Senate Committee on the Judiciary (S. Rep. 2230, 81st Cong., 2d Sess.), after summarizing and quoting from the testimony of former high officials of the Communist Party during the 1949 hearings, set forth the conclusions upon which the provision is based, as follows (pp. 10, 11, 12, 16):

> Since the rise of Soviet Russia during the past three decades, the problem of subversives has become a vital consideration in any evaluation of national immigration and naturalization policies. The impact of world events upon our immigration system can no longer be ignored. As an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrow-

[33] As originally introduced, S. 1832 would have provided stricter controls over visas and other travel documents, and strengthened the laws governing the exclusion and deportation of subversive aliens, without specifically referring to the Communist Party of the United States.

ing the democratic Government of the United States by force, violence, and subversion.

* * * * *

The Communist International has in its employ a network of agents whose sole function is to organize and promote Communist activity, sabotage, espionage, propaganda, and terrorism. These agents are sent into the United States and other countries under the policy of the Communist high command. Although some of the agents are native-born Americans or have acquired citizenship through naturalization, a large majority of them are aliens.

* * * * *

The Comintern realizes that it cannot rely on native Americans because to do so involves the constant risk of having its work impeded or exposed. It is to be expected that the loyalty of a native American or of a citizen of long standing would occasionally reassert itself, despite the most intensive Communist indoctrination.

The break with the Communist Party by men like Louis Budenz, Howard Rushmore, Jay Lovestone, Benjamin Gitlow, and others offers conclusive proof to Moscow that it can only rely on its own chosen agents for the work of destroying America. In the event of a clash of arms between the Soviet homeland and this country, the Communists would find it even more difficult to rely upon native Americans and those of foreign origin who become Americanized.

* * * * *

It is a well-established fact that both the leadership and membership of the Communist

Party is recruited overwhelmingly from alien ranks. During the course of its 30 years of existence in this country the Communist Party has been ruled exclusively by alien agents appointed by the Communist International headquarters in Moscow.

The high command of the party in this country invariably has been dominated by aliens or persons of foreign origin. These facts have been documented by the testimony presented before the subcommittee.

* * * * *

From the statements made before the subcommittee, as well as the general evidence gathered—the history of the Communist movement, the changes of its policies, the manner of its expression, the utterances of the Comintern leadership—the conclusion is inescapable that the Communist Party and the Communist movement in the United States is an alien movement, sustained, augmented, and controlled by European Communists and the Soviet Union. The severance of this connection and the destruction of the life line of communism becomes, therefore, substantially an immigration problem.

After reviewing existing law, the Committee noted (pp. 24–25) that:

* * * While Congress has clearly proscribed classes of aliens which are to be excluded from admission or deported after admission, there is the obvious difficulty of establishing that certain aliens or organizations do advocate overthrowing the Government by force or violence. It is inherent in the tactics of such persons and

> organizations that their real intentions be concealed under an aura of legitimacy in order to accomplish their purpose. Thus, though it may be common knowledge that certain organizations advocate such beliefs, satisfactory proof of that position offers a formidable obstacle. The evidence developed by the subcommittee should remove any doubt about the Communist Party's advocating the overthrow of our Government by force or violence in order to consummate its plans of a world-wide Communist totalitarian dictatorship. Yet, membership in the Communist Party, without positive proof that it so advocates the overthrow of government by force and violence, is insufficient grounds for deporting such an alien member.

The substance of the Committee's conclusions is embodied in the findings which Congress made in Section 2 of the Internal Security Act as to the purposes and methods of communism, "as a result of evidence adduced before various committees of the Senate and House of Representatives" (64 Stat. 987–989). The first of these findings states:

> There exists a world Communist movement which, *in its origins, its development, and its present practice*, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, * * * and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization. [Emphasis added.]

The bitter debate over the internal security bill did not relate to Section 22. Indeed, the dissenting minority of the Senate Committee on the Judiciary

stated that "We do not quarrel with the provision * * * for the exclusion of alien members of the Communist Party of the United States, or with the later provision [Section 22 of the Internal Security Act] for their deportation. It is undisputed that the Communists of the world, including the United States, are the fifth column allies of the Soviet Union." S. Rep. 2369, Part 2, 81st Cong., 2d Sess., p. 14.[34]

In the context of the legislative findings, Section 22 is thus a substantially unanimous Congressional determination, based on years of legislative investigation, that the Communist Party of the United States has at all times been a foreign-controlled organization devoted to the ultimate overthrow of the government by violence and, more immediately, acting as a fifth column in aid of Soviet aggression.[35]

3. *Judicial and administrative adjudications as to the Communist Party.*—As the Court has observed, "* * * a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect." *Block* v. *Hirsh,* 256 U. S. 135, 154. When such a declaration by Congress is supported not only by its own investigations but by repeated judicial and administrative determinations that the Communist Party has advo-

[34] Section 22 was not contained in the internal security bill as it passed the House (see H. Rep. 3112, 81st Cong., 2d Sess., p. 48; 96 Cong. Rec. 15287). It was added by the Senate and included in the conference substitute. The debate in the House on the conference bill, and in overriding the Presidential veto, did not touch directly on Section 22.

[35] Section 22 has now been embodied in the Immigration and Nationality Act of 1952 (Pub. Law 414, 82d Cong.) as Section 241 (a) of that Act.

cated the violent overthrow of the Government, it should not be disturbed in the absence of the most extraordinary circumstances. See *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1), (covering the period 1919–1920); *Antolish* v. *Paul*, 283 Fed. 957 (C. A. 7) (early 1920's); *Ungar* v. *Seaman*, 4 F. 2d 80, 81 (C. A. 8) (1912–1920); *Ex parte Jurgans*, 17 F. 2d 507, 511 (D. Minn.) (early 1920's); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9) (1926–1929); *Murdoch* v. *Clark*, 53 F. 2d 155 (C. A. 1) (the 1920's); *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. A. 2) (the late 1920's); *Kjar* v. *Doak*, 61 F. 2d 566 (C. A. 7) (the late 1920's); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1) (1930–1935); *Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C. A. 2) (1925–1939); *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2) (1945–1948).

In the course of affirming the *Dennis* conviction (341 U. S. 494), in upholding the related deportation provisions in the same Alien Registration Act of 1940 (*Harisiades* v. *Shaughnessy*, 342 U. S. 580, see *supra*), in sustaining the anti-Communist affidavit requirement of the Taft-Hartley Act (*American Communications Ass'n* v. *Douds*, 339 U. S. 382), and in enforcing the deportation and bail provisions of the Internal Security Act of 1950 (*Carlson* v. *Landon*, 342 U. S. 524), this Court has recognized that the facts revealed by judicial trials and Congressional investigations beginning in 1931 (H. Rep. 2290, 71st Cong., 3d Sess.) down to date, when read in the light of recent political and military developments, and underscored by persistent espionage and other fifth

columr activity by Communists in this country and elsewhere on behalf of the Soviet Union, amply justify the conclusion of Congress that the Communist Party has advocated overthrow of the Government by force and violence. See also *Adler* v. *Board of Education*, 342 U. S. 485.[36]

Years of administrative adjudications likewise stand behind the legislative findings embodied in the Internal Security Act in 1950. The Immigration and Naturalization Service estimates that from 1918 to September 1950 (when the Internal Security Act was passed) approximately 200 aliens were adjudged to be members of the Communist Party (or its predecessors or affiliates) and in each case the Party was administratively determined, under the deportation statute as it then read, to advocate the forcible overthrow of the Government.[37]

---

[36] In *Schneiderman* v. *United States*, 320 U. S. 118, an attempt by the Government to denaturalize for fraud, the Court held that the evidence in the record as to the Communist Party's advocacy in 1927 of force and violence was not indisputable enough to meet the requirement that proof of fraud in naturalization be "clear, unequivocal, and convincing". But the Court specifically refused to pass for itself on the issue of the Party's advocacy of force (320 U. S. at 158), and declared that it was not deciding "what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record, or that petitioner's [Schneiderman's] testimony is acceptable at face value." The case turned wholly on the special requirements of proof in denaturalization proceedings, and does not constitute an adjudication as to the true nature of the Communist Party. See *Yates* v. *United States*, 354 U. S. 298, 336–338.

[37] Almost half of these adjudications were in the period 1918–1926, and the other half in the period from 1921 to September 1950. There were about 75 such adjudications in the decade from 1930 to 1940.

These judicial and administrative findings are significant, not only because they give great weight and sanction to the legislative determination, but also because they indicate the smallness of the possibility that petitioner, or any other alien, could show that the Communist Party did not advocate force and violence. That theoretical choice is practically non-existent, and Congress has really done no more than eliminate the burden of introducing again and again in deportation proceedings evidence, documentary and oral, as to the Party's nature and activities.[38] By Section 22 Congress has substituted for a process of routine proof in individual cases a uniform rule based on its own investigations, prior judicial and administrative proceedings, and facts of current and past history known to all.[39]

---

[38] See *Milasinovich* v. *The Serbian Progressive Club*, 369 Pa. 26, and *Albert Appeal*, 372 Pa. 13, in which the Supreme Court of Pennsylvania held that judicial notice may be taken of the fact that the Communist Party advocates the overthrow of the government by force. In the latter case, the court stated that (372 Pa. at 20–21):

> It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement. * * *.

[39] It is important to note that under the pre-1950 system (upheld in *Harisiades*) a finding by the immigration officials that the Communist Party advocated force, based on the usual documentary evidence and the testimony of one or more persons who were key members of the Party during the period of the alien's membership, would be upheld on *habeas corpus*, even though

4. *Congressional power, under the due process clause, to deport specifically named classes of aliens.*—As we have just shown (*supra*, pp. 55–66), legislative investigations and findings, judicial and administrative decisions, and common knowledge, all combine to reinforce Congress' determination in the 1950 Act that the Communist Party advocates, and has always advocated, forcible overthrow of the Government and that alien Communists should be deported. As in *Harisiades*—which itself refers explicitly to the connections of the Communist Party with force and with the Soviet Union (342 U. S. at 590–1) (see *supra*, p. 52)—Congress' view cannot be called a "fantasy or a pretense"; it cannot be said that "there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security" (342 U. S. at 590). That being so, the basic rationale of *Harisiades* (and its predecessor decisions) compels the upholding of Congress' deliberate choice to deport past and present Communists.

The practice of Congress, in the 1950 Act, of specifically naming the Communist Party, instead of continuing to use the more general classification of the 1940 Act which does not refer in terms to the

---

there was other evidence to the contrary. See *Tisi* v. *Tod*, 264 U. S. 131, *Bilokumsky* v. *Tod*, 263 U. S. 149, *Vajtauer* v. *Commissioner*, 273 U. S. 103, all affirming and applying the rule that the immigration officials' findings of fact must be upheld if supported by some evidence, even though the finding might be held erroneous on a *de novo* judicial appraisal.

Party, has support, as we have pointed out, in the history of the Party. It was upheld as to deportation of present Party members in *Carlson* v. *Landon*, 342 U. S. 524, 534–536 (*supra*, p. 51). The naming of the Communist Party in the oath provision of the Taft-Hartley Act was sustained in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, and *Osman* v. *Douds*, 339 U. S. 846, 847.

The practice of designating a class by name also has the support of judicially-validated deportation precedents relating to other groups. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 717, tells us that the root of the Chinese exclusion and deportation laws was the belief that "the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests * * *." See also *Wong Wing* v. *United States*, 163 U. S. 228, 237 ("aliens whose race or habits render them undesirable as citizens"). But Congress did not take the various components of these charges against the Chinese and fashion a general category of deportable aliens which would not mention the Chinese by name but was intended to cover them by its general description. Congress, as in this case, chose to specify instead of to generalize; it listed by name the class the bulk of whose members it found to be undesirable residents, even though it may be assumed

that there were individual Chinese who could plainly not be characterized as "strangers in the land". For many years, "anarchists" have been excluded by name and held deportable, and the Court has upheld the statute even as applied to one professing to be a philosophical anarchist "innocent of evil intent". *Turner* v. *Williams*, 194 U. S. 279, 294.[40]

Also, in enacting Section 22, Congress was proceeding by conscious analogy[41] to the Alien Enemy Act of 1798 which authorizes the deportation of aliens who are nationals of a country at war with the United States or by which invasion of American territory is "threatened." As this Court noted in *Harisiades* v. *Shaughnessy*, 342 U. S. at 587:

> War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to

[40] In this connection, it is appropriate to recall the other general classes of aliens Congress has classified as deportable. See footnote 21, *supra*, p. 39. A survey of these categories will show instances in which persons who fall into a deportable class may well be individually and personally worthy. *E. g.*, Sections 241 (a) (3) and (8) of the 1952 Act, dealing with aliens who become public charges or are institutionalized at public expense for mental disease.

[41] See S. Rep. 2230, 81st Cong., 2d Sess., pp. 16–17; *The Immigration and Naturalization Systems of the United States*, S. Rep. 1515, 81st Cong., 2d Sess., pp. 788–789.

authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use.

By the Alien Enemy Act, Congress conferred upon the President power to deport aliens who are nationals of a hostile country without regard to whether a particular alien had ever evidenced the slightest hostility to the interests of the United States.[42] Presidential action under the Act is reviewable only upon the issue of whether the particular alien falls into the category of enemy aliens. *Ludecke* v. *Watkins*, 335 U. S. 160.

The Alien Enemy Act dealt with problems of internal security created by actual or threatened hostilities between national states and with the techniques of warfare which existed in the early 19th century. In 1950, Congress was dealing with the threat to the peace and security then and now confronting the United States. It has found that Communists everywhere have as their objectives the violent overthrow of non-Communist governments and serving the interests of the Soviet Union. It has found that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists. *Supra*, pp. 59–63. It has concluded, in effect, that the possibilities of political violence and treachery, particularly in a time of crises, on the part of alien members of the

---

[42] That the Fifth Congress which enacted the Alien Enemy Act did not regard the use of its powers over aliens to protect the security of the nation as limited to periods of actual war, is emphasized by the fact that the House twice rejected proposals to delete the words "or threatened". Annals of Congress, 5th Cong., 2d Sess., pp. 1786, 1792.

Communist Party are too great for the United States to assume the risks of attempting to distinguish between those members of the Party who have knowledge of and share its purposes, and those who do not, or of determining the sincerity of those who assert they have left the Party and rejected its principles. *Supra*, pp. 9–23, 44–50, 55–63.

If a statute passed during time of war specifically named the enemy countries whose citizens were to be detained or deported, it would be just as valid as if it referred to "enemies" generally, with precisely the same intention and meaning. For instance, if we were at war with the Soviet Union, or a war was threatened, Congress could specifically order the expulsion of nationals of that particular country. The Constitution certainly does not bar treating in the same way alien members of the organization which the past thirty years have demonstrated to be merely the *alter ego* of the aggressive Communist state. For, unlike the Alien Enemy Act, the applicability of Section 22 of the Internal Security Act of 1950 is determined, not by the accidents of birth and ancestry, but by an alien's voluntary membership in the Communist Party. As this Court said in *American Communications Association* v. *Douds*, 339 U. S. 382, 391:

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct,

it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

In Section 22 of the 1950 Act, Congress was not merely enacting into a "conclusive presumption" its legislative determination that the Communist Party advocated the forcible overthrow of the Government. Congress was not merely declaring that the Party fell within the previously-defined general class of organizations with unlawful objectives. Congress was also creating a new class of deportable aliens:—those belonging to an entity which both advocates violence and at the same time is, and has been, under the direction and control of the "Communist dictatorship of a foreign country." See Section 2 of the 1950 Act. The factor of control by the Soviet Union, stressed by the Committee on the Judiciary (see *supra*, pp. 59–62), is a factor new to our deportation legislation and cannot be disregarded. Only the Communist Party and its affiliates and associated groups fall within the new class, and Congress was therefore not singling out the Party for a special legislative "determination." In the Alien Enemy Act of 1798, the Congress adopted similar legislation providing for the removal of nationals of enemy countries or of nations which threatened invasion of this country or a "predatory incursion."

In sum, the overwhelming testimony received by Congress, confirmed by events of common knowledge, as to the purposes of the Communist Party and as to the major role played by aliens in organizing the

Party and keeping it under the control of the Soviet Union, demonstrates that Section 22 is not an unreasonable exercise of Congress' plenary powers over aliens in order to protect the security of the United States, and does not violate the due process clause. And the history of expulsion legislation is sufficient to prove that Congress is entitled to make this judgment for itself and need not remit to individual hearings the issues of the Communist Party's nature and tenets or the alien's knowledge of the Party's objectives.[43] See also *infra*, pp. 73–77 (on the *ex post facto* and attainder provisions of the Constitution).

C. THE DEPORTATION OF PAST COMMUNISTS DOES NOT VIOLATE THE EX POST FACTO OR BILL OF ATTAINDER PROVISIONS OF THE CONSTITUTION

1. *Ex post facto clause.*—The opinion in *Harisiades* addressed itself to the contention that retrospective deportation legislation violated the *ex post facto* clause, and determined that there was no such viola-

[43] The basic fallacy in the argument that due process is denied because no hearing is allowed on the nature of the Party is the failure to distinguish deportation from a criminal proceeding. The difference is pointed out clearly in the dissent in *United States* v. *Spector*, 343 U. S. 169, 174. Referring to a Chinese deportation case, Justice Jackson said in *Spector*, a criminal case (343 U. S. at 176, fn. 3):

> That Court thereby made it clear that there is a great distinction between deportation itself and a deportation order that may be made the basis of subsequent criminal punishment. It is that distinction which we press for here.

See also *Wong Wing* v. *United States*, 163 U. S. 228, discussed *infra*, pp. 75–76.

tion (see 342 U. S. at 593–596).[44] That ruling was reiterated in *Galvan* (347 U. S. at 531); *Marcello* v. *Bonds*, 349 U. S. 302, 314; *Lehmann* v. *Carson*, 353 U. S. 685, 690; and *Mulcahey* v. *Catalanotte*, 353 U. S. 692, 694.

2. *Bill of attainder clause.*—Section 22 does not violate the bill of attainder provision of Article I, Section 9, Clause 3, of the Constitution, by specifically naming the Communist Party. See *Carlson* v. *Landon*, 342 U. S. 524, 535–6 (*supra*, p. 51). A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *United States* v. *Lovett*, 328 U. S. 303, 315. As the Court has held again and again, deportation may be harsh, drastic, and severe, but it is not a criminal proceeding and it is not a punishment. *Carlson* v. *Landon*, 342 U. S. 524, 537; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594–5.[45] The bill of attainder cases (*Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333, and *Pierce* v. *Carskadon*, 16 Wall. 234), on which reliance is placed, have been explained by the Court as proceeding "from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise" and "have never been considered to govern deportation," 342 U. S. at 595. And the specific holdings in *Harisiades*, *Marcello*, *Galvan*,

---

[44] For a detailed discussion of the *ex post facto* clause and retrospective legislation, see the Government's brief in *Harisiades* (Oct. Term, 1954, Nos. 43, 206, 264), at pp. 102–116.

[45] To the same effect, see *Mahler* v. *Eby*, 264 U. S. 32, 39; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 709, 730; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Wong Wing* v. *United States*, 163 U. S. 228, 237.

Carson, Catalanotte, Mahler, and *Bugajewitz,* that deportation is not a punishment for the purpose of the *ex post facto* clause, also dispose of the contention that a deportation statute can be a bill of attainder which necessarily inflicts punishment. See the concurring opinion in *United States* v. *Lovett,* 328 U. S. at 323.

Moreover, deportation is one legislative field in which there is a long history of naming specific groups—especially the Chinese and the anarchists. See *supra,* pp. 67 *ff.* Of the Chinese deportation cases, *Wong Wing* v. *United States,* 163 U. S. 228, contrasting deportation of the Chinese and their punishment by imprisonment, most aptly demonstrates the inapplicability of the bill of attainder clause to deportation. A resident alien Chinese was summarily sentenced to 60 days at hard labor and then ordered deported, under the statute involved in *Fong Yue Ting* v. *United States, supra,* 149 U. S. 698 (discussed *supra,* pp. 27, 29–30, 34–35), for having been found in the United States without a certificate of residence. The sentence of imprisonment was condemned as punishment without a judicial trial. "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." 163 U. S. at 237. See *United States* v. *Spector,* 343 U. S. 169, 174–177 (Jackson J., dissenting). But the deportation of Chinese was upheld, following *Fong Yue Ting.* "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country

from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein." 163 U. S. at 237. Deportation was not to be considered as punishment.

Even if, despite this history and the Court's prior rulings, each deportation provision is to be individually tested to see whether it is an attempt to inflict punishment, Section 22 is valid. *Harisiades* establishes that there is a sufficient connection between past membership in a subversive organization and present desirability as a resident for Congress to take action to expel such aliens, not as punishment but in order to rid the country of a potential threat. 342 U. S. at 590–1, 595–6. That is what Congress sought to do in the 1940 Act and also in the 1950 legislation. The legislative history of both statutes establishes without doubt that Congress thought the residence in this country of aliens who had previously been members of a subversive group was undesirable and dangerous. *Supra*, pp. 9–23, 44–50, 55–63. There was no purpose or attempt to punish. The history of the provision extends over a period of more than 30 years and this history shows that it is a direct method of accomplishing the Congressional objective of terminating the residence of such aliens, not an indirect attempt to reach some other result. Certainly, five distinct Congresses, in 1918, 1920, 1940, 1950, and 1952, would not have entertained improper motives. It cannot therefore be said that this law was enacted, as were the Civil War statutes and the one involved in *United States* v. *Lovett*, 328 U. S. 303, to *punish* ascertained

individuals or classes. Rather, it is a deliberate Congressional judgment that a particular class of aliens represents a danger to the welfare of the country and that its license to remain here should be revoked. Cf. *Hawker* v. *New York*, 170 U. S. 189, 196–7.

D. THE DEPORTATION OF PAST COMMUNISTS SUCH AS PETITIONER DOES NOT VIOLATE THE FIRST AMENDMENT

The claim is made that Section 22 violates the First Amendment. The authoritative answer is given, once again, by the *Harisiades* decision (342 U. S. at 591–2). The Court said that "the test applicable to the Communist Party has been stated too recently [in *Dennis* v. *United States*, 341 U. S. 494] to make further discussion at this time profitable." Petitioner was a member of the Communist Party, and his case is therefore precisely the same as *Harisiades*.

CONCLUSION

For the reasons stated in our brief on the original argument, and in this brief, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

OSCAR H. DAVIS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

SEPTEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957